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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1994

WILLIAM DOUGLAS CARTER,

Petitioner,

V.

WILLIAM T. BURCH,

Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a prosecutor is entitled to absolute prosecutorial immunity when he withholds materially exculpatory evidence pre-trial?

2. Whether a prosecutor is entitled to absolute prosecutorial immunity when he withholds materially exculpatory evidence first learned after the conviction?

3. Whether a prosecutor is entitled to absolute prosecutorial immunity when he conspires to fabricate evidence pre-trial?

LIST OF PARTIES

The parties to the proceeding before the United States Court of Appeals for the Fourth Circuit were the petitioner William Douglas Carter, the respondent William T. Burch, and Deputy Sheriff Vernon Beamer, defendant/appellee, Sheriff John R. Isom, and Deputy Sheriff Jeffrey Brown, defendants.

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The reported opinion of the United States Court of Appeals for the Fourth Circuit and the unreported opinions of the United States District Court for the Eastern District of Virginia are reprinted in the Appendix to this petition.

JURISDICTION

This suit was brought under the Civil Rights Act of 1871, 42 U.S.C. §1983. Subject matter jurisdiction in the district court was founded on 28 U.S.C. §1331, federal question. Appellate jurisdiction in the United States Court of Appeals was founded on 28 U.S.C. §1291, appeals from all final decisions of the district court. Jurisdiction of this Court to review the judgment of the Court of Appeals is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Civil Rights Act of 1871, 42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, or the District of Columbia subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

A. PROCEEDINGS BELOW.

The petitioner, William Douglas Carter ("Carter"), was once a successful, wealthy businessman living on a farm in Loudoun County, Virginia. On March 11, 1988, he was convicted and incarcerated on maliciously wounding and felony firearm charges growing out of the July 31, 1987 shooting of his ex-wife, Carole Vandergrift Carter. At the time of the shooting he was 55 years old. Almost four years later, on February 14, 1992, he was released from prison on a writ of habeas corpus when his conviction was overturned by the state court on the grounds that materially exculpatory evidence known by the authorities (the "Poppa evidence") had been withheld from him. At the conclusion of his new trial on July 28, 1992, he was acquitted by a jury of all charges.

On November 17, 1992, Carter filed his complaint in U.S. District Court for the Eastern District of Virginia, Alexandria Division, seeking redress for violations of his civil rights by defendants for conspiring and denying him his rights to due process of law at his first trial, thereby causing him to spend four years in prison. The complaint was amended by Order entered June 22, 1993. J.A. 104. The defendants named were William T. Burch, Commonwealth's Attorney for Loudoun County, who prosecuted Carter at the first trial, John R. Isom, Sheriff of Loudoun County, and Vernon Beamer and Jeffrey Brown, Deputy Sheriffs of Loudoun County.

On January 8, 1993, the court dismissed the complaint against defendant William T. Burch on the grounds of prosecutorial absolute immunity. Appendix at 21.

A jury trial began on July 6, 1993 against defendant Beamer, after dismissal of defendants Isom and Beamer on summary judgment. On July 8, 1993, the jury returned a verdict in favor of Carter on his civil rights claim against Beamer and awarded compensatory damages of $1.00.

On July 23, 1993, the court denied Carter's motion for a new trial or to amend the judgment to award at least the unrebutted special damages on the general verdict of liability against Beamer. The district court ruled the nominal damage award could be explained by the jury concluding that Deputy Sheriff Beamer was not a "proximate cause" of damages to the plaintiff because, under one scenario, prosecutor Burch was the proximate cause of withholding the materially exculpatory evidence. Appendix at 26.

On September 9, 1994, the Fourth Circuit affirmed the dismissal of prosecutor Burch on the grounds of absolute prosecutorial immunity and also affirmed the nominal verdict award of $1.00 against Deputy Sheriff Beamer. Appendix at 7-13.

In granting Burch absolute prosecutorial immunity for withholding materially exculpatory evidence, the court noted there was a conflict in the testimony as to when Burch first became aware of it, i.e., whether prior to the first trial or, as Burch testified, "several months" after Carter's conviction. The court reasoned that either way, Burch was absolutely immune.[1]

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[1] The nominal damage verdict against Beamer would not preclude a substantial damage award against Burch because, as the District Court and Fourth Circuit ruled, there

If Burch knew of the Poppa evidence before Carter's trial, "[t]he decision whether to turn this evidence over to defense counsel would have occurred after Carter's arrest, but before his conviction and is clearly part of the presentation of the State's case." Appendix at 12.

Alternatively, if Burch did not learn of the Poppa evidence until after Carter's conviction and thereafter withheld it, the court reasoned that he was still entitled to absolute immunity because at the time Burch was still involved in post-trial motions and the appeal as an advocate for the State. Appendix at 12.

The court also held that Burch's involvement in a conspiracy to fabricate testimony, as supported by the affidavit of Suzanne Culver, was absolutely immune because that involved "the presentation of false testimony in court." Appendix at 13.

B. STATEMENT OF FACTS.

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was evidence Beamer's actions, while violating Carter's constitutional rights, did not proximately cause his injuries. Appendix at 15 and 28-29. If Burch learned of the Poppa evidence pre-trial, he was a proximate cause of Carter's damages in being convicted in the first trial. Likewise, if Burch first learned of the Poppa evidence post-conviction, Carter was damaged by spending several more years in prison because of Burch's misconduct before he was given a new trial and acquitted.

1. Underlying Criminal Trial.

In the early morning hours of July 31, 1987, Carole Vandergrift Carter, the ex-wife of petitioner Carter, was shot and wounded by her own .38 caliber pistol in the bedroom of her home outside of Middleburg, Virginia. Later that day, Carter was arrested at his cottage in Saratoga Springs, New York on a warrant of malicious wounding of his ex-wife. In October 1987, he was indicted on charges of malicious wounding and use of a firearm in commission of a felony.

Respondent Burch prosecuted the case as Commonwealth's Attorney for Loudoun County, Virginia in a jury trial which began on March 8, 1988. In preparation for the case, Burch anticipated a defense of attempted suicide or self-inflicted wound. J.A. 59.

On March 11, 1988, the jury found Carter guilty of both charges. He was sentenced to 14 years in prison and immediately incarcerated. He remained incarcerated in the jails and prisons of the Commonwealth of Virginia until he was released on February 14, 1992 after being awarded a writ of habeas corpus.

2. The "Poppa Evidence."

On November 19, 1991, a deputy sheriff of Loudoun County, Douglas Poppa, came forth with evidence which lead to Carter's release from prison and a new trial. At the habeas corpus hearings on November 20, 1991 and January 7 and 8, 1992, and at the new trial in July 1992, Poppa testified that several months prior to the July 31, 1987 shooting, he was contacted by Carole Vandergrift Carter and interviewed for a potential job as a security bodyguard at her home. At the time

he had left the Sheriff's office for personal reasons.

During a lengthy interview in which she drove him to the estate and back to his home in Sterling, she spoke incessantly about how much she hated her ex-husband. Throughout the conversation she was high-strung, nervous, and extremely talkative. At one point she pulled out a Smith and Wesson .38 caliber revolver which she had recently purchase to show him. J.A. 123-24.

At another point in the conversation, speaking of her husband, she said, "I hate him so much . . . I would shoot myself even if I died if I could make it look like he did it so he would spend the rest of his life in jail, ruin the rest of his life." J.A. 129. Poppa decided not to take the security job she offered him.

3. Poppa Reported His Evidence To Deputy Sheriff Beamer.

Several months later, while watching the television news, Poppa learned of the July 31, 1987 shooting. J.A. 136. A couple of days later, he spoke with Captain Vernon Beamer, head of the Criminal Investigative Division of the Sheriff's Office, and asked about the investigation of the shooting of Carole Carter. Beamer told him she was shot with her own gun. He then related to Beamer that, a couple of months before, she had showed him that gun and she had wanted to hire him as a bodyguard, but that he had not taken the job.

Poppa went on to tell Beamer that Carole Carter had told him: "I hate my husband so much I would shoot myself, even if I died, if I could make it look like he did it, so he would ruin his life, spend the rest of his life in jail." J.A. 138. Beamer's response was that the case was "wrapped up" and they "got the

guy in New York or Canada." J.A. 138-39.

In September 1991 when Carter was being booked, Howard Fry, a former corrections officer in the jail of Loudoun County, overheard a conversation among Beamer and two other officers who were standing at the booking desk.

> I heard Vernon Beamer make the statement that one of his investigators had told him that Carter's wife would do anything to frame her husband up to and including shooting herself.

J.A. 259. One of them responded, "I hope that doesn't get out. It would blow your case." At that point, "all three nodded in agreement and kind of chuckled." J.A. 260.

Beamer did not turn Poppa's evidence over to the Commonwealth's Attorney's office.

4. Poppa Reported His Evidence to Respondent Burch.

Poppa returned to the Loudoun County Sheriff's Department in January 1988. According to him, in January or February 1988, he went to see Burch and told him everything he had previously told Beamer several months before concerning his interview with Carole Carter. In particular, he told Burch that Carole Carter said she would shoot herself and make it look like he did it in order to send him to jail and ruin his life, or words to that effect. J.A. 172-73. Burch replied he had "a lot of evidence" against Carter and it looked like the case was "wrapped up." J.A. 172.

According to respondent Burch, he did not learn of the

"Poppa evidence" until "several months" after Carter's conviction:

> I have a recollection of a conversation with Deputy Poppa after the trial of the case, sometime, I would say, several months after the trial of the case. I don't recall the exact context, or where it was, but it was to the effect that Deputy Poppa had some contact with the victim in this Carter case . . . prior to the shooting and that her mental state, she had struck as being suicidal, something along those lines . . ..

J.A. 62.

Burch acknowledged the Poppa evidence was exculpatory and discoverable by a criminal defendant. He agreed that, if related, he had a duty to turn over the Poppa evidence to the defense in accordance with *Brady v. Maryland* and his professional ethical obligations. J.A. 65-66.

In an affidavit Burch stated that post-trial motions extended until September 8, 1988 and the final order was entered on September 19, 1988. Burch wrote the Commonwealth's brief opposing Carter's petition for appeal. On June 14, 1989, the Virginia Court of Appeals awarded Carter an appeal, and thereafter the Attorney General's office handled the appeal of the case. J.A. 51

According to Burch, "sometime between Mr. Carter's conviction [March 11, 1988] and June 14, 1989, while I still represented the Commonwealth in Mr. Carter's prosecution, I had a conversation with Douglas Poppa that plaintiff alleges resulted in my coming into possession of exculpatory

information. I had no further conversations with Mr. Poppa concerning the Carter matter." J.A. 51.

Burch never turned over the "Poppa evidence" to Carter or his counsel. Carter was tried and convicted without knowing about Poppa or his evidence.

5. The Writ Of Habeas Corpus.

On February 6, 1992, the Circuit Court of Loudoun County granted Carter a writ of habeas corpus, ordered him released from prison, and overturned his conviction on the grounds that his due process rights were violated in connection with this prosecution and conviction.

Judge Arthur W. Sinclair held:

> [T]he police (sheriff's department) had knowledge of evidence which the Commonwealth's Attorney admits from the stand was exculpatory . . .. [T]he petitioner has proven by a preponderance of the evidence that material evidence of an exculpatory nature was not revealed to the defense upon request at the trial which resulted in his conviction and present incarceration.

J.A. 4-5.

6. Significance Of The Poppa Evidence.

The suppressed Poppa evidence was materially exculpatory and the outcome of the trial would have been different had he had it. J.A. 215-218. As explained by Carter's expert witnesses, there were two defense theories at the first trial: an alibi defense that Carter was on his way to his cottage

in Saratoga, New York, and not at the farm house in Loudoun County, Virginia at the time of the shooting, and that the shooting was self-inflicted. J.A. 211. The alibi defense was inconclusive because of conflicting evidence as to how long it would take to drive to his New York cottage. The defense testimony was it took ten hours or so and the prosecution's evidence was that it took about seven or eight hours. There was little or no evidence to support the self-inflicted wound theory at the first trial.

The prosecutor's evidence rested on the credibility of Carole Carter because there was no physical or other evidence he was in Carole's home the night of the shooting. Yet, at the first trial there was "very little evidence to impeach" Carole Carter's credibility. J.A. 212.

The Poppa evidence was "consistent" with the self-inflicted wound theory. Poppa described Carole as so "emotionally upset," so "irrational", and as hating her ex-husband so much that "she would be the kind of person" who would shoot herself. This was "considerably different" than the rational, controlled woman as portrayed in the first trial by the prosecution. This evidence "struck at the heart of her credibility," and showed her "intent" and "motive." J.A. 218.

Beamer's expert witnesses admitted the Poppa evidence was "exculpatory," but denied it was "materially exculpatory," i.e., evidence that would change the result of a trial. J.A. 405.

District Judge Bryan stated at a bench conference that the Poppa evidence was both exculpatory and material. "I think it's not only exculpatory, I think it's material, and I think that's a question for the Court. I think that." J.A. 305. Nevertheless, he left the question of materiality up to the jury. And the jury,

in finding Beamer liable, necessarily found the Poppa evidence to be materially exculpatory.

7. Conspiracy To Fabricate Evidence Prior To The First Trial.

Carter alleged that Burch also conspired to fabricate evidence prior to his first trial by coaching and instructing the witness Suzanne Culver to deny under oath that Carole Carter had told her shortly after the shooting that she was shot with her own .38 caliber pistol. At the time of the shooting, Culver was living in Carole's mansion. At trial, Culver falsely denied that Carole Carter had told her anything about the caliber of weapon used in the shooting. In May 1991, Culver came forward and admitted her perjury and stated in an affidavit and testified at the second trial that Burch had coached her to testify falsely at the first trial.

Suzanne Culver's testimony at the first trial denying that Carole Carter had told her anything about the caliber of the weapon was used to rebut the anticipated defense of self-inflicted wound. Due to the darkness of the room and the circumstances of the shooting, Carole likely would not have known the weapon was her own .38 caliber pistol unless she had used it to shoot herself.

It was also used to show that Carter's knowledge in the early afternoon of July 31, 1987 that Carole had been shot with a .38 caliber pistol evidenced his guilt and to rebut Carter's evidence that such knowledge was obtained innocently from his brother and his girlfriend, Rebecca Elgin, in the morning of the shooting. Elgin testified she received this information from Sheriff John Isom earlier that morning. In rebuttal, Isom falsely denied telling Elgin that Carole had been shot with a .38 caliber

pistol and testified he did not know the kind of weapon used in the shooting at the time he spoke with Elgin. J.A. 17.

The Court of Appeals of Virginia, in affirming Carter's original conviction, noted that his knowledge that Carole had been shot with a .38 caliber pistol "became a focal point in the jury trial." *Carter v. Commonwealth*, 393 S.E.2d 639, 641 (Va. App. 1990).

8. Damage Evidence.

Carter spent almost four years in prison -- from March 11, 1988 to February 14, 1992 -- as a result of his conviction. He endured great suffering in overcrowded, substandard jails and prisons during these years. J.A. 279-86. He also incurred $233,969.00 in expenses after his conviction through appeals, the habeas corpus proceeding and the new trial. J.A. 292. During his time in prison, he also earned virtually no income, whereas he had earned between $155,799 and $307,511 in each of the prior four years. An expert economist projected the present value of his lost earnings to be $1,940,047.00. J.A. 320.

REASONS FOR GRANTING THE WRIT

1. THE FOURTH CIRCUIT'S OPINION THAT PROSECUTOR BURCH IS ENTITLED TO ABSOLUTE IMMUNITY FOR WITHHOLDING MATERIALLY EXCULPATORY EVIDENCE IS A GRAVE MISAPPLICATION OF THIS COURT'S ANALYSIS THAT THE PROSECUTOR MUST CARRY THE BURDEN OF ESTABLISHING A PRE-1871 COMMON LAW IMMUNITY AND A POLICY JUSTIFICATION FOR IMMUNIZING THE CHALLENGED FUNCTION, THE FOURTH CIRCUIT OPINION CONFLICTS WITH SIXTH AND SEVENTH CIRCUIT OPINIONS THAT WITHHOLDING EVIDENCE PRE-TRIAL AND POST-TRIAL, RESPECTIVELY, IS NOT ABSOLUTE IMMUNE, AND REVIEW IS NECESSARY TO ADDRESS AND REMEDY A SERIOUS NATIONAL PROBLEM OF PROSECUTORS SUPPRESSING EXCULPATORY EVIDENCE.

This Court should grant a writ of certiorari in this case because the Fourth Circuit's opinion seriously misapplied this Court's analysis for determining absolute prosecutorial immunity as set forth in *Imbler v. Pachtman*, 424 U.S. 411 (1976); *Burns v. Reed* 500 U.S. 478 (1991); and *Buckley v. Fitzsimmons*, 509 U.S.___, 125 L.Ed. 2d 209, 113 S.Ct. 2606 (1993) that the prosecutor carries the burden of establishing a pre-1871 common law absolute immunity and a policy justification for

granting absolute immunity for the function performed. In addition, the Fourth Circuit's ruling is directly in conflict with the Sixth Circuit opinion in *Hilliard v. Williams*, 516 F.2d 1344 (6th Cir. 1975)(pre-trial suppression not absolutely immune) and the Seventh Circuit opinion in *Houston v. Partee*, 758 F. Supp. 1228 (N.D. Ill. 1991), *aff'd*, 978 F.2d 362 (7th Cir. 1992) *cert. denied* 507 U.S. ___, 123 L.Ed.2d 269, 113 S.Ct. 1647 (1993)(post-trial suppression not absolutely immune). Finally, because suppression of evidence by prosecutors, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny, and ethical cannons, is a serious national problem which Section 1983 liability can deter and remedy, this Court should correct the erroneous lower court opinion to prevent further misapplication of prosecutorial immunity standards and to discourage this serious prosecutorial abuse which strikes at the heart of the truth seeking function of the courts and denies justice to our citizens.

The Civil Rights Act of 1871, 42 U.S.C. §1983, grants no immunity to public officials by its own terms. Common law immunities existing when the statute was passed in 1871, however, are deemed included under the presumption the legislature did not intend to eliminate traditional common law immunities. *Imbler v. Pachtman*, 424 U.S. at 418; *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951). The burden rests with the State official who seeks the protection of absolute immunity to justify it for the function performed, and this Court has been "quite sparing" in recognizing absolute immunity. *Forrester v. White*, 484 U.S. 219, 224 (1988). Qualified immunity "represents the norm" for executive officers. *Malley v. Briggs*, 475 U.S. 335, 340 (1986).

Without question, wilful withholding of materially exculpatory evidence by prosecutors severely injures the truth

seeking function of the judicial process and causes grave miscarriages of justice to citizens. It is also by definition outside the supervision and control of the judicial process when it occurs. *Imbler v. Pachtman*, 424 U.S. at 432-47 (White, J., concurring opinion)(absolute immunity does not extend to a prosecutor suppressing evidence, whether pre-trial or post-trial).

No pre-1871 case has been found which immunizes a prosecutor absolutely for suppressing evidence. At common law, absolute immunity was accorded prosecutors only in suits for malicious prosecution and defamation in court on the grounds that the decision to charge and conduct inside the court room should remain subject to independent judgment without fear of personal liability. *See e.g. Imbler v. Pachtman*, 424 U.S. at 420-24; *Burns v. Reed*, 500 U.S. at ___, 114 L.Ed. 2d at 557. Charging decisions and presentation of evidence are also subject to the adversarial process and under judicial supervision and control.

Thus, following pre-1871 common law precedent, this Court in *Imbler v. Pachtman* held that a prosecutor was immune from damage suits under Section 1983 "in initiating a prosecution and in presenting the State's case." 424 U.S. at 431. Common law immunity of prosecutors is based on the same considerations underlying common law immunity of judges and jurors acting within the scope of their duties, namely, the need for independence of judgment required by his public trust so he would not "shade his decisions" out of fear of civil liability. The adversary system's goal of accurately determining guilt or innocence requires that both the prosecution and the defense have wide discretion "in the conduct of the trial and the presentation of evidence." *Id.* at 426.

The Court emphasized that immunity is based upon "the

functional nature of the activities" he performs rather than his status as a prosecutor. Thus, a prosecutor engaged in investigative or administrative activities has only qualified immunity comparable to that of a policeman. *Id.* at 430. Activity which is absolutely immune is only that which is "intimately associated with the judicial phase of the criminal process," i.e., initiating and presenting the prosecution's case at trial.

No issue of suppression of evidence was presented in *Imbler* or in this Court's subsequent decisions on prosecutorial immunity: *Burns v. Reed, supra* and *Buckley v. Fitzsimmons, supra*. Indeed, in *Buckley*, after the conviction, the prosecutor uncovered and turned over to the defense, and to the Governor considering the death sentence, new evidence corroborating Imbler's alibi defense and questioning the trustworthiness of the prosecution's primary eyewitness. 424 U.S. at 413. Unlike the present case, the prosecutor's disclosure of this exculpatory evidence gave the defendant an opportunity to bring it the judicial system which eventually granted him habeas corpus relief. Thus, by the prosecutor adhering to the ethical responsibility of disclosing exculpatory evidence, the judicial system was able to work and justice was accomplished.

As this present case dramatically demonstrates, when exculpatory evidence is suppressed, justice is denied. While evidence was withheld, Carter languished almost four long years in prison. Thus, full disclosure of exculpatory evidence must be fully encouraged by subjecting prosecutors who wilfully fail this duty to civil liability.

In *Burns v. Reed, supra*, this Court distinguished the prosecutor's out-of-court conduct of giving legal advice to the police, which was not absolutely immune, from the in-court

conduct of presenting evidence at a probable cause hearing to obtain a search warrant, which was absolutely immune. In that case, the prosecutor advised the police that they could interview a criminal suspect under hypnosis. While under hypnosis, the suspect made certain statements indicating she had multiple personalities, one of which shot and wounded her two sons while they slept. At a probable cause hearing before a judge to obtain a search warrant, the prosecutor presented evidence that the suspect had confessed, but failed to inform the judge that the confession was obtained under hypnosis or that she consistently denied shooting her sons.

Absolute immunity was granted for presenting evidence at the probable cause hearing because of the pre-1871 common law immunity for defamatory statements in a judicial proceeding. However, advising the police in the investigative phase of a criminal case is not so "intimately associated with the judicial phase of the criminal process" as to qualify for absolute immunity. 114 L.Ed.2d at 562-63.

The Court also noted that the absence of absolute immunity for giving legal advice may encourage prosecutors to consider their advice more carefully. It would also be "incongruous" to allow prosecutors to be absolutely immune for giving advice to the police, but allow only qualified immunity to the police for following that advice. *Id.* at 564.

Finally, the out-of-court activities of a prosecutor in giving legal advice to the police are not subject to the "crucible of the judicial process." 114 L.Ed.2d at 565. There are no safeguards to prevent abuse of power when the activity occurs outside judicial oversight. Similarly, the Attorney General was not absolutely immune from liability for authorizing a warrantless wire tape in *Mitchell v. Forsyth*, 472 U.S. 511

(1985) because he was not acting in a prosecutorial capacity, even though the evidence obtained might lead to a prosecution.

Most recently, in *Buckley v. Fitzsimmons, supra,* this Court held that a prosecutor was not absolutely immune for fabricating evidence during an investigation of a crime and defamation at a press conference announcing return of the indictment. The prosecutor was charged with "shopping" for an expert to fabricate evidence relating to a bootprint on the door of a murder victim's home to link the plaintiff to the crime. Both activities occurred outside the judicial proceeding and neither were protected by pre-1871 common law absolute immunity.

In the present case, Burch withheld from the courts and Carter the materially exculpatory Poppa evidence. According to Poppa, the evidence was given to Burch prior to the first trial. He told Burch the same information he had given several months before to Deputy Sheriff Beamer regarding Carole Carter's statement that she would shoot herself and frame her ex-husband. According to Burch, on the other hand, he first learned of the Poppa evidence "several months" after Carter's conviction while the case was involved in post-trial motions and on appeal.

Either way, suppression of materially exculpatory evidence is not entitled to absolute immunity because it undermines the truth seeking function of the judicial process and prevents the courts from adjudicating a just and fair decision to a citizen.

Moreover, turning over such evidence involves no "quasi-judicial" decision making, such as the decision to charge, and involves no advocacy function. It is a purely administrative function without which the judicial process is deprived of the

opportunity to do justice. Only when the evidence is turned over to the defense can it become subjected to the "crucible of the judicial process." *Burns v. Reed*, 114 L.Ed. 2d at 565. Only when the defense obtains the evidence can the prosecutor's function become advocacy.

Finally, suppression of materially exculpatory evidence can not be adequately remedied absent Section 1983 liability. Commentators have noted how widespread prosecutorial misconduct is and how little deterrence the alternatives of professional disciplinary action and criminal prosecution are. *See e.g.* B. Gershman, Prosecutorial Misconduct, §1.8(a) & (d) (1992); Steele, "Unethical Prosecutors and Inadequate Discipline," 38 Sw. L. J 965 (1984). *See generally* Anno., "Disciplinary Action Against Attorney for Misconduct Related to Performance of Official Duties as Prosecuting Attorney", 10 A.L.R.4th 605 (1981).

The Fourth Circuit reasoned that the decision to withhold evidence pre-trial "would have occurred after Carter's arrest, but before his conviction," and therefore it must be "part of the presentation of the State's case." Appendix at 12. However, withholding evidence can not be part of the presentation of evidence. Only disclosed evidence can be part of the presentation of evidence in court. Moreover, as this Court made clear in *Buckley*, a prosecutor is not absolutely immune for all actions taken after an indictment. Even after charges are brought, "a prosecutor may engage in 'police investigative work' that is entitled to only qualified immunity." 125 L.Ed.2d at 227 n. 5. And he may engage in administrative duties "that do not relate to an advocate's preparations for the initiation of a prosecution or for judicial proceedings." 125 L.Ed.2d at 226.

The preparation for presenting evidence in court clearly does not include withholding exculpatory evidence. Trial preparation involves the exercise of judgment and decision making in professionally analyzing the evidence and preparing to present it at trial. *Buckley v. Fitzsimmons*, 125 L.Ed.2d at 226. The decision to turn over exculpatory evidence, however, is not subject to a prosecutor's discretion. It is a mandatory requirement. *Brady v. Maryland, supra*. The ABA Code of Professional Responsibility mandates:

> "The prosecutor should make timely disclosure to the defense of available evidence, known to him, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment."

Ethical Considerations, E.C. 7-13. *See also* Disciplinary Rules, D.R. 7-103(B). Where there is a legitimate question, *in camera* review is available. *See e.g.* Edwards, "Professional Responsibilities of the Federal Prosecutor," 17 U. Rich. L. Rev. 511, 529 (1983). Thus, the decision to turn over exculpatory evidence is not part of the preparation for presenting evidence in court and does not implicate any discretionary "quasi-judicial" decision making of the prosecutor.

Moreover, civil liability under Section 1983 can only be maintained for willful violations of "clearly established" statutory or constitutional standards a reasonable person would have known. *Anderson v. Creighton*, 483 U.S. 635 (1987); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1972); *Malley v. Briggs*, 475 U.S. 335, 341 (1986)(qualified immunity protects "all but the incompetent or those who knowingly violate the law"). Thus, only wilful withholding of clearly exculpatory evidence is actionable. In this case, for example, even Burch acknowledged that the evidence was "exculpatory," as did Beamer's expert

witnesses.

The purely administrative -- even ministerial -- act of disclosing materially exculpatory evidence is similar to the prosecutor's acts in *Allen v. Lowder*, 875 F.2d 82 (4th Cir. 1989). There the court refused to bestow absolute immunity on a prosecutor for obtaining a court order to continue the plaintiff's incarceration after his conviction was reversed. The court noted the prosecutor's post conviction acts were "at best" purely administrative.

The Fourth Circuit's opinion in this case also squarely conflicts with the Sixth Circuit's opinion in *Hilliard v. Williams*, 516 F.2d 1344 (6th Cir. 1975), which was cited with approval by Justice White in his concurring opinion in *Imbler*. There the Sixth Circuit held a state prosecutor liable for, among other things, withholding exculpatory evidence pre-trial. There an FBI report showing stains on a jacket and a curtain were not blood was withheld from the defendant resulting in her spending a year in jail.

Suppression of evidence by a prosecutor does not warrant absolute immunity any more than suppression of evidence by an investigator, such as Deputy Sheriff Beamer who was granted only qualified immunity in this case. Absolute immunity to the prosecutor for the same function which an investigator is granted only qualified immunity for would be anomalous and contrary to "one of the goals of our §1983 immunity jurisprudence: insuring parity of treatment among state actors engaged in identical functions." *Buckley v. Fitzsimmons*, 125 L.Ed.2d at 236 (Kennedy, J., concurring in part and dissenting in part). As this Court said in *Buckley*, when the functions are the same, the immunity "is also the same, i.e., qualified immunity only." 125 L.Ed.2d at 228.

Moreover, the judicial process is not available to correct suppression of evidence when it occurs because it is by definition not known to the court or the defendant at the time. Indeed, the judicial system is injured when evidence is withheld from it. *Imbler v. Pachtman*, 424 U.S. at 443 (White, J., concurring opinion). Absent Section 1983 liability, there is little deterrent to such gross abuses of prosecutorial power and subversion of the truth seeking function of the judicial process. Liability for damages caused by such unconstitutional conduct "has the very desirable effect of deterring such conduct." *Imbler v. Pachtman*, 424 U.S. at 442 (White, J., concurring opinion).

When exculpatory evidence first learned post conviction is withheld, any rationale that the decision is somehow part of the prosecutor's preparation for trial is obviated by the conclusion of the trial and the conviction of the defendant. Because the trial is over, the prosecutor's function can hardly be considered preparation for trial, much less part of the decision to charge. The trial advocate's role is over. The fact finding process is completed. The conviction is won. Thus, granting absolute immunity for the post conviction misconduct of withholding exculpatory evidence is even less justifiable than for pre-trial suppression of evidence.

Furthermore, there can be no post-trial motions or appellate issues involving the evidence which has been suppressed. Because the evidence has been withheld from the defendant and the court, there is no advocacy role for the prosecutor to play. The role of the courts to review post-conviction whether the defendant received a fair trial is also subverted by withholding exculpatory evidence learned post conviction.

The Fourth Circuit's ruling in absolutely immunizing suppression of exculpatory evidence first learned post-conviction squarely conflicts with the Seventh Circuit opinion in *Houston v. Partee*, *supra* holding prosecutors liable for withholding evidence first learned pre-trial. The Seventh Circuit affirmed the district court holding that prosecutors are not absolutely immune from Section 1983 liability for suppression of exculpatory evidence that they first learn of post-conviction and willfully withhold from defense counsel and the post-conviction court.

In *Houston v. Partee*, two plaintiffs (Houston and Brown) were convicted of murder based on questionable identifications. While their direct appeals were pending in the Illinois Appellate Court, the prosecutors discovered evidence corroborating Houston's testimony at trial and exonerating him of the murder. Like the present case, prosecutors did not disclose this to the court or to the criminal defendants until after the two wrongfully convicted men had developed the information from other sources. Meanwhile, again like Carter, Houston and Brown served four years in prison for a crime that they did not commit.

As in the present case, the defendant prosecutors in *Houston* contended they were entitled to absolute immunity because the plaintiffs' appeals were still pending when they learned of the exculpatory evidence; they argued the act of defending those appeals was part of the prosecution. In rejecting this argument, the Seventh Circuit noted that absolute immunity does not attach at the beginning of the prosecution and continue indefinitely.

The Fourth Circuit attempted to distinguish the Seventh Circuit's opinion in *Houston v. Partee* by seizing on the fact that

the prosecutors there were not "personally" prosecuting the appeal while, in the present case, Burch did participate in the appeal of Carter's conviction. This factual distinction makes no legal difference under this Court's "functional" test. Whether they were personally involved in the appeal at the time is immaterial to their duty to turn over such evidence to the defendant. Such duty derives from the ethical duty of lawyers to divulge such evidence whether in a judicial proceeding or otherwise. The duty of disclosure is not dependent on the prosecutor's role as advocate; rather it is related to the prosecutor's role as administrator of justice. *See e.g.* ABA Code of Professional Responsibility E.C.7-13, *supra*.

The fact that the prosecutors in *Houston v. Partee, supra,* were held liable for nondisclosure of exculpatory evidence first learned post conviction when they were <u>not</u> involved in the appellate process establishes that such duty derives not from their function as advocates, but rather from their function as administrators of justice.

The Fourth Circuit relied upon the notion that "although the trial had been completed, Burch's functions in representing the State in Carter's post-conviction motions and direct appeal very much implicated the judicial process." Appendix at 13. However, the withholding of evidence -- the function involved here -- was strictly extrajudicial; it involved no advocacy function, trial preparation, or court proceeding. It was the act of an administrator. None of the issues in the case through the direct appeal involved the Poppa evidence. In diverting the issue from the prosecutor's out-of-court conduct of withholding exculpatory evidence to his separate and distinct function in post-conviction judicial proceedings, the Fourth Circuit ignored this Court's observation that a prosecutor may be both an administrator and advocate at the same time. Immunity is not

predicated on his status, but rather on his function. The lower courts avoided any careful analysis of the function performed by prosecutor Burch in withholding the exculpatory Poppa evidence.

Accordingly, this Court should grant this petition for writ of certiorari to review the judgment of the Fourth Circuit in order to correct a grave misapplication of this Court's analysis of prosecutorial absolute immunity to withholding materially exculpatory evidence, to resolve a conflict between the Fourth Circuit and the Sixth Circuit (regarding immunity for suppression of evidence pre-trial) and the Seventh Circuit (regarding immunity for suppression of evidence first learned post-trial), and to address and remedy a serious national problem of prosecutorial withholding of exculpatory evidence which undermines the ability of the courts to administer justice to our citizens.

2. THE FOURTH CIRCUIT OPINION THAT PROSECUTOR BURCH IS ABSOLUTELY IMMUNE FOR CONSPIRACY TO FABRICATE TESTIMONY CONFLICTS DIRECTLY WITH THIS COURT'S OPINION IN *BUCKLEY V. FITZSIMMONS,* CONFLICTS WITH FIRST, SECOND AND SIXTH CIRCUIT OPINIONS, AND MUST BE CORRECTED TO PREVENT FURTHER MISAPPLICATION OF THE PROSECUTORIAL ABSOLUTE IMMUNITY STANDARD AND TO ADDRESS AND REMEDY A SERIOUS NATIONAL PROBLEM.

This Court held in *Buckley v. Fitzsimmons, supra*, that

"there is no common-law tradition of immunity for" fabrication of evidence. 125 L.Ed.2d at 227 n. 5. There, a prosecutor's alleged fabrication and conspiracy to fabricate bootprint evidence was held not absolutely immune because it was investigatory in nature. This Court noted that fabricating evidence was not part of a prosecutor's "professional evaluation of the evidence assembled by the police and appropriate preparation for its presentation at trial . . .." 125 L.Ed.2d at 226.

Based on the affidavit of Suzanne Culver, Carter claims that Burch conspired to fabricate testimony by coaching her to deny that Carole Carter stated that she was shot with "her own .38 caliber pistol." In her sworn affidavit, Suzanne Culver stated:

> Before the trial, the Commonwealth Attorney coached me on what I should say at trial. I was instructed by the Commonwealth Attorney not to say that Carole said 'Doug shot me with my .38,' even though I told him that Carole did say 'Doug shot me with my .38.'

J.A. 2. The true evidence would have established Carole's own knowledge at the time of the shooting that the weapon was her own pistol so as to suggest a self-inflicted gun shot wound and to rebut that she was the victim of an intruder and also to corroborate Carter's innocent knowledge later that morning that she was shot with a .38 caliber pistol.

Again, the Fourth Circuit misapplied this Court's "functional" test. While the presentation of such evidence in court is entitled to absolute immunity, as is the witness' testimony in court, *Briscoe v. LaHue*, 460 U.S. 325 (1983), the out-of-court fabrication of such evidence and conspiracy to do

so is not entitled to absolute immunity. The Court recognized this distinction in *Buckley* and noted that, if police solicit fabricated evidence, it is not absolutely immune. 125 L.Ed. at 228 n. 6. Thus, when the prosecutor solicits fabricated evidence, he is entitled to no more than the same consideration, i.e., qualified immunity only. "When the functions of prosecutors and detectives are the same . . . the immunity that protects them is also the same." 125 L.Ed.2d at 228.

There is a critical distinction between a prosecutor preparing a witness for trial, on the one hand, and coaching and instructing a witness what to say, on the other hand. In the former, the prosecutor is evaluating the evidence and planning for its clear and logical presentation in court, rather than conspiring to fabricate and soliciting the fabrication of evidence which does not exist, as in the latter. Every trial lawyer understands this distinction which is critical to the adversary system of justice.

In *Buckley* the fabrication occurred pre-indictment. But the timing of the fabrication is not material. Indeed, this Court noted in *Buckley* that even after charges are brought, "a prosecutor may engage in 'police investigative work' that is entitled to only qualified immunity." 125 L.Ed.2d at 227 n. 5 (majority opinion). The dissent in *Buckley* also noted that after an indictment, "a prosecutor might act to further police investigative work say by finding new leads, in which case only qualified immunity should apply." 125 L.Ed.2d at 236 (Kennedy, J., concurring in part and dissenting in part).

The Fourth Circuit opinion is in conflict with the Second Circuit opinion *San Filippo v. U.S. Trust Co. of New York, Inc.*, 737 F.2d 246 (2d Cir. 1984), *cert. denied*, 470 U.S. 1035 (1985). There the court held that absolute immunity does not

extend "to cover extra-judicial conspiracies between witnesses and the prosecutor to give false testimony." *Id.* at 255.

The Fourth Circuit is also in conflict with the First Circuit. In *Malachowski v. City of Keene*, 787 F.2d 704, 711 (1st Cir), *cert. denied* 479 U.S. 828, *rehearing denied*, 479 U.S. 1022 (1986) the court noted that "proper allegations of conspiracy could overcome the immunity" afforded by *Imbler* for prosecutors.

In *Hilliard v. Williams*, 516 F.2d 1344 (6th Cir. 1975), the court held that a state prosecutor was liable not only for withholding exculpatory evidence, but also for "instruct[ing]" an investigator not to mention an FBI report that stains on a jacket and a curtain were not blood unless specifically questioned about it. *Cf. Alioto v. City of Shively*, 835 F. 2d 1173 (6th Cir. 1987)(extending *Briscoe* immunity to testifying witness, but not to nontestifying parties, in Section 1983 conspiracy action). Thus, Sixth Circuit opinions directly conflict with the Fourth Circuit opinion that a prosecutor is absolutely immune for the out-of-court conspiracy to fabricate witness testimony.

Thus, a prosecutor's absolute immunity from civil liability for presenting perjured testimony in court does not extend to the out-of-court conspiracy to fabricate such testimony and the solicitation of false testimony pretrial.

Accordingly, this Court should grant this Writ to correct a substantial misapplication of the "functional" test for determining prosecutorial absolute immunity, to resolve a conflict between the Fourth Circuit and the First, Second and Sixth Circuits, and to address and remedy the grave problem of prosecutors conspiring to fabricate and fabricating evidence pre-trial.

CONCLUSION

1. The Fourth Circuit erred in extending the scope of absolute immunity to prosecutor Burch beyond this Court's holdings in *Imbler*, *Burns*, and *Buckley*. Withholding materially exculpatory evidence is not protected by absolute immunity because the prosecutor is functioning as an administrator, rather than an advocate, in not disclosing it. The common-law existing in 1871 does not support engrafting immunity for this function on Section 1983 which does not allow for any immunity by its terms. Because the prosecutor has not carried his burden of demonstrating the existence of immunity for this conduct in 1871, absolute immunity does not exist.

Policy also does not support absolute immunity. A prosecutor's independence of judgment and "quasi-judicial" decision making would not be constrained by imposing liability for suppression of materially exculpatory evidence. On the other hand, potential civil liability would deter prosecutorial abuse and encourage fuller disclosure of exculpatory evidence and thereby prevent injury to the judicial process and to our citizens.

Suppression of materially exculpatory evidence first learned post-conviction warrants the extraordinary cloak of absolute immunity even less than when evidence is suppressed pre-trial. After the conviction, the prosecutor's function in preparing and presenting evidence at trial is at an end. Post-conviction motions and appeals can not involve any evidence suppressed. Absent Section 1983 liability, there is no judicial oversight to govern this out-of-court, post-conviction abuse of prosecutorial power. And the function of the courts to right an unjust conviction by consideration of newly discovered exculpatory evidence learned post-conviction is subverted.

2. The claim of prosecutor Burch conspiring to fabricate evidence prior to trial is also not protected under *Buckley*. Conspiracy to manufacture evidence, as distinct from presenting the evidence in court, is not conduct protected from civil liability because it is investigatory in nature.

For the foregoing reasons, this Court should grant a Petition for a Writ Certiorari to the Fourth Circuit.

Respectfully submitted,

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

WILLIAM DOUGLAS CARTER,	)
	)
Plaintiff-Appellant,	)
	)
v.	)
	)
WILLIAM T. BURCH;	)
VERNON BEAMER,	)
	)
Defendants-Appellees,	)
	)
and	)
	)
JOHN R. ISOM; JEFFREY BROWN,	)
Defendants.	

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria.
Claude M. Hilton, District Judge; Albert V. Bryan, Jr., Senior District Judge; W. Curtis Sewell, Magistrate Judge.
(CA-92-1629-A)

Argued: May 10, 1994

Decided: September 9, 1994

Before NIEMEYER and WILLIAMS, Circuit Judges, and ERWIN, Senior United States District Judge for the Middle District of North Carolina, sitting by designation.

Affirmed by published opinion. Judge Williams wrote the opinion, in which Judge Niemeyer and Senior Judge Erwin joined.

COUNSEL

ARGUED: John Saul Edwards, Roanoke, Virginia, for Appellant. Jack L. Gould, Fairfax, Virginia, for Appellee Burch; John J. Brandt, SLENKER, BRANDT, JENNINGS & JOHNSTON, Merrifield, Virginia, for Appellee Beamer.

OPINION

WILLIAMS, Circuit Judge:

William Douglas Carter (Carter) brought this action pursuant to 42 U.S.C. § 1983(1988), against Commonwealth's Attorney William T. Burch and police officer Captain Vernon Beamer, for alleged violations of his constitutional rights. Specifically, Carter claims that Burch and Beamer withheld materially exculpatory evidence before and after his criminal trial for the malicious wounding of his ex-wife, and that Burch conspired to present false testimony during the trial. The district court dismissed the § 1983 action pursuant to Fed. R. Civ. P. 12(b)(6) against Burch based on absolute prosecutorial immunity, but denied Beamer's motion

for summary judgment, allowing the claim against him to go to trial. After a two-day trial, the jury returned a verdict in favor of Carter, but awarded only $1.00 in nominal damages. The district court denied Carter's motion under Fed. R. Civ. P. 59 for a new trial and declined to amend the judgment.

In this appeal, Carter challenges, *inter alia*, both the district court's determination that Burch was protected by absolute prosecutorial immunity, and the court's refusal either to grant a new trial or to amend the judgment to award additional damages against Beamer. Finding no error, we affirm.

I.

The factual background of Carter's civil rights claims against Burch and Beamer stem from his criminal conviction for the malicious wounding of his ex-wife. In the early morning hours of July 31, 1987, Carole Vandergrift Carter (Vandergrift) was shot and wounded in her home outside of Middleburg, Virginia, by her own .38 pistol. Vandergrift and Carter had recently finalized a long and acrimonious divorce. Carter was arrested for the crime later that day at his cottage in Saratoga Springs, New York, and was indicted in Virginia on charges of malicious wounding and the use of a firearm during the commission of a felony.

William T. Burch prosecuted the case as Commonwealth's Attorney for Loudoun County, and a four-day jury trial was held in March 1988. At the trial, Vandergrift testified that Carter awoke her in the middle of the night, a struggle ensued, and he shot her in the head behind her right ear. The bullet exited her neck without inflicting serious injury. Carter presented an alibi defense by

testifying that he had left Virginia on the evening prior to the shooting, and had travelled to Saratoga, New York. Carter's attorneys also argued that Vandergrift was an emotionally unstable person, and may have attempted to shoot herself, either to commit suicide, or to frame Carter in the shooting. After the jury returned a guilty verdict against Carter on both charges, he was sentenced to fourteen years in prison and was immediately incarcerated in the Loudoun County jail. Carter remained incarcerated until February 14, 1992, when he was released on a writ of habeas corpus, retried for the same crimes, and acquitted. His release was precipitated by the discovery of exculpatory evidence which was not provided to Carter at the time of the first trial. The events surrounding this discovery are the basis for Carter's civil rights claims.

In the fall of 1991, over three years after Carter's conviction, Douglas Poppa, a deputy sheriff of Loudoun County, contacted Carter's defense counsel and informed him of exculpatory evidence that he had told to both Beamer and Burch before Carter's trial and which had not been revealed to defense counsel. The evidence, to which he testified at the habeas corpus hearing and at Carter's second criminal trial, concerned Vandergrift's emotional state near the time of the shooting. Several months prior to the shooting, Poppa had interviewed with Vandergrift for a position as her bodyguard. He characterized her as high-strung and described a disturbing conversation he had with her during the interview. Vandergrift spoke at length about how much she hated her ex-husband, and at one point in the conversation, Poppa claimed that Vandergrift said, "I hate him so much... I would shoot myself even if I died if I could make it look like he did it so he would spend the rest of his life in jail, ruin the rest of his life." (J.A. at 129.) Also during the interview, she showed Poppa her .38 revolver, the gun later allegedly used by Carter

to wound her.

Several months after his interview with Vandergrift, Poppa testified that he heard of the shooting on the evening news and reported the events of his interview to Appellee Beamer, the head of the Criminal Investigation Division. Poppa claims that Beamer told him that the case is wrapped up and we got the guy in New York or Canada." (J.A. at 138-39.) Beamer never disclosed, nor directed Poppa to disclose, this evidence to Burch or Carter's defense counsel.

Moreover, Poppa also testified that he told Burch about Vandergrift's statements. Although Poppa contends that his conversation with Burch occurred before Carter's first trial, according to Burch it happened several months after Carter's conviction. Burch admits, however, that when he learned of this evidence, he failed to disclose it to defense counsel. It is also undisputed that this evidence was not presented in Carter's first trial.

In the fall of 1991, several years after Carter was convicted, Poppa testified that he saw a television movie in which a woman framed a police officer for murder. This movie reminded him of the Carter case and caused him to wonder why he had never been called to testify. After discussing the evidence with a state judge Poppa contacted Carter's defense counsel and informed him of the evidence. Based on the nondisclosure of this evidence, Judge Sinclair, of the Thirty-First Judicial Circuit of Virginia, released Carter on a writ of habeas corpus, finding that Carter had proven by a preponderance of the evidence that material evidence of an exculpatory nature had not been revealed to defense counsel. Carter was tried again and acquitted.

Subsequent to his acquittal, Carter filed this lawsuit pursuant to 42 U.S.C. § 1983. He contends that Beamer and Burch violated his constitutional rights by withholding the "Poppa evidence." Carter also alleges that Burch conspired to present false testimony during his first trial. The district court dismissed Burch as a defendant based on absolute prosecutorial immunity, but allowed the case against Deputy Beamer to proceed to trial. After deliberating for approximately seven hours, the jury returned with a note: "We, the jury, cannot agree on whether or not the Poppa evidence is materially exculpatory or exculpable.... Please advise. We are deadlocked on this issue." (J.A. at 453.) The judge gave the jury an Allen charge,[1] to which Carter objected. Approximately one-half hour later, the jury returned with a verdict in favor of Carter, and nominal damages totaling $1.00.

Because Carter had shown undisputed evidence of over $2 million in damages for the present value of his lost past and future income due to his incarceration and expenses caused by his conviction, he requested a new trial, or an increase in the award of damages to include, at least, the undisputed compensatory damages he presented at trial.[2] The

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[1] In *Allen v. United States*, 164 U.S. 492 (1896), the Supreme Court held that it was appropriate for a court to give an instruction to dead-locked jurors, advising them to give deference to each other's views and to listen open-mindedly to each other's arguments in an attempt to reach a unanimous verdict.

[2] At the time of the shooting, Carter was the president of

district court denied this motion, and although it found Carter to be a prevailing party, declined to award attorney's fees pursuant to 42 U.S.C. § 1988 (1988). In appealing this final judgment, Carter challenges: 1) the district court's dismissal of his claim against Burch based on absolute prosecutorial immunity; 2) the district court's denial of his motion for a new trial, or to amend judgment; 3) the district court's decision to give an Allen charge to the deadlocked jury; 4) the district court's refusal to admit as evidence Judge Sinclair's letter opinion granting Carter a writ of habeas corpus, and expert testimony interpreting that letter opinion; and 5) the district court's denial of attorney's fees. We consider each issue in turn.

II.

Carter first alleges that the district court erred when it dismissed his claim against Burch pursuant to Fed. R. Civ. P. 12(b)(6) based on absolute prosecutorial immunity. In reviewing the propriety of a Rule 12(b)(6) dismissal, we consider "whether the complaint, accepting the allegations as true, allws a recovery." *Waterford Citizens' Ass'n v. Reilly*, 970 F.2d 1287, 1290 (4th Cir. 1992). true, allows a recovery."

The district court granted Burch absolute prosecutorial immunity as to both of Carter's allegations. Carter contended that Burch withheld materially exculpatory evidence when he failed to turn the "Poppa evidence" over to defense counsel and that Burch conspired to present false

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his own engineering communications company, and was earning a salary of at least $155,000 to over $300,000 a year.

testimony during the trial. To support the allegation that Burch conspired to present false testimony, Carter presented an affidavit from Suzanne Culver, a witness at his trial, who was staying with Vandergrift at the time of the shooting. In the affidavit, Culver stated that Burch coached her not to testify that Vandergrift had stated that she was shot with her own gun. Carter claims that this information supported his self-inflicted wound defense theory, because, given the dark of night at the time of the shooting, the only way Vandergrift would have known it was her gun was if she had used it herself.

For important public policy reasons, the Supreme Court held in *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976), that absolute prosecutorial immunity is essential for activities "intimately associated with the judicial phase of the criminal process...." Prosecutors must often make decisions that could produce a colorable cause of action for deprivations of constitutional rights, and "[d]efending these decisions, often years after they were made, could impose unique and intolerable burdens upon a prosecutor responsible annually for hundreds of indictments and trials." *Id.* at 425-26. For example, the veracity of witnesses is often questionable before and after they testify, and a prosecutor must not be influenced by concern about possible personal liability as to whether to use the testimony of such witnesses. *Id.* at 426. Thus, the Court specifically held that "in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under § 1983." *Id.* at 431.

In so ruling, the Court realized the potential for unfair application of this rule toward a defendant who was genuinely wronged by a dishonest or malicious prosecutor. Directed to this problem, the Court stated:

> [T]he alternative of qualifying a prosecutor's immunity would disserve the broader public interests. It would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system. Moreover, it often would prejudice defendants in criminal cases by skewing post-conviction judicial decisions that should be made with the sole purpose of insuring justice.

Id. at 427-28. The Court noted that there are other ways to punish prosecutorial misconduct, such as professional disciplinary action and criminal prosecution. *Id.* at 429. Thus, the Court in *Imbler* found that the importance of protecting the integrity of the prosecutor's office and the judicial system outweighs the desire to afford civil redress to a genuinely wronged defendant.

However, the immunity afforded to prosecutors attaches to the functions they perform, and not merely to the office. Therefore, when a prosecutor performs duties which are not intimately associated with the judicial process, only qualified immunity is granted. For example, in *Burns v. Reed*, 300 U.S. 478, 492-96, Ill S. Ct. 1934, 1942-45 (1991), the Court held that a prosecutor was entitled to absolute immunity for appearing as a lawyer for the State in a probable cause hearing, but should only be granted qualified immunity for giving advice to the police. The Court reasoned that, in a probable cause hearing, the prosecutor appears before a judge and presents evidence to support the issuance of a search warrant, which necessarily implicates the prosecutor's role in the judicial process, thus invoking absolute immunity. *Id.* at 1942. In contrast, giving advice to the police is more

connected to the prosecutor's investigatory as opposed to his judicial functions. *Id.* at 1943. The Court noted that it would be incongruous to grant prosecutors absolute immunity for giving advice, but only grant the police qualified immunity for following the advice. *Id.* at 1944. Accordingly, the Court held that prosecutors are only entitled to qualified immunity for their function of advising the police.

In *Buckley v. Fitzsimmons*, 113 S.Ct. 2606 (1993), the Court further outlined the distinctions between the prosecutor's investigatory and judicial functions. Buckley involved allegations that several prosecutors had fabricated evidence during the preliminary investigation of a crime and had made false statements at a press conference announcing the return of an indictment. *Id.* at 2610. The Court held that neither activity was protected by absolute immunity. The Court reasoned that the fabrication of evidence during the preliminary investigation of a crime was more related to the investigatory function generally performed by a detective or police officer, and thus should not be afforded absolute immunity. "When a prosecutor performs the investigative functions normally performed by a detective or police officer, it is 'neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other.'" *Id.* at 2616 (quoting *Hampton v. Chicago*, 484 F.2d 602, 608 (7th Cir. 1973), *cert. denied*, 415 U.S. 917 (1974)). In addition, the Court noted that the alleged fabrication of evidence occurred before an arrest, and thus before the judicial process had been implicated. *Id.* at 2616.

In addressing the allegation that the prosecutors made false statements to the press, the Court concluded that those statements were also only protected by qualified immunity. "The conduct of a press conference does not involve the

initiation of a prosecution, the presentation of the state's case in court, or actions preparatory for these functions." *Id.* at 2618. Thus, the Court concluded that neither the fabrication of evidence transpiring before the arrest, nor the false statements to the press, were functions sufficiently connected to the judicial process to justify granting absolute immunity to the prosecutors.

We now apply these principles to the allegations before us. Carter's first claim of prosecutorial impropriety involves Burch's alleged withholding of materially exculpatory evidence when he failed to turn the "Poppa evidence" over to defense counsel. There is a conflict in testimony as to when Burch first became aware of the relevant evidence. Poppa testified that he informed Burch of his conversation with Vandergrift before the first trial, while Burch testified that he did not learn of the evidence until several months after Carter's conviction. In either situation, Burch was clearly protected by absolute immunity. If Burch knew of the "Poppa evidence" before Carter's trial, the decision as to whether the evidence was exculpatory and should have been given to defense counsel involved Burch's actions as an advocate of the State. Such a decision was clearly intended by *Imbler* to be the type of prosecutorial function for which absolute immunity should be granted. The Court stated:

> We recognize that the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom....Preparation, both for the initiation of the criminal process and for a trial, may require the obtaining, reviewing, and evaluating of evidence.

424 U.S. at 431 n.33. The decision whether to turn this evidence over to defense counsel would have occurred after Carter's arrest, but before his conviction, and is clearly part of the presentation of the State's case.

Carter, alternatively, argues that if Burch indeed did not learn about the "Poppa evidence" until alter Carter's conviction and thereafter withheld the evidence, Burch would not be entitled to absolute immunity because at the time of the violative act, his role in the judicial process would have been concluded. *See Houston v. Partee*, 978 F.2d 362, 367 (7th Cir. 1992), *cert. denied*, 113 S.Ct. 1647 (1993). In *Houston*, the court held that prosecutors who withheld materially exculpatory evidence subsequent to the trial and conviction were only entitled to qualified immunity, because they were no longer personally involved in the post-conviction proceedings. *Id.* at 366-67. At the time the prosecutors learned of the evidence, the claimants' direct appeals were pending before the Illinois Appellate Court, but different prosecutors were handling the appeals. The court held that, once the prosecutors were no longer personally involved in the case, their actions did not implicate the judicial process and they were not entitled to absolute immunity. Here, however, the evidence is uncontradicted that, at the time Burch testified that he learned of the "Poppa evidence" and failed to disclose it, he was handling the post-conviction motions and the initial direct appeal to the Court of Appeals of Virginia, after which the Attorney General's office took over. In these post-trial motions and preparations for appeal, Burch was still functioning as an advocate for the State, and not in an investigatory capacity.

This case is also very different from *Buckley*, where the misconduct occurred before the initiation of the judicial

process. In contrast, here we are faced with a situation where, although the trial had been completed, Burch's functions in representing the State in Carter's post-conviction motions and direct appeal very much implicated the judicial process. Accordingly, we hold that the district court correctly determined that Burch was entitled to absolute prosecutorial immunity for the allegation that he withheld materially exculpatory evidence.

Carter also alleged that Burch was involved in a conspiracy to present false testimony, as supported by the affidavit of Suzanne Culver. The Court in *Imbler* specifically held that the presentation of false testimony in court is a charge for which the prosecutor is afforded absolute immunity. *See Imbler*, 424 U.S. at 416, 431. We therefore hold that the district court correctly granted Burch absolute immunity for this charge as well.

III.

Carter next objects to the jury verdict awarding $1.00 in nominal damages as impermissibly inconsistent with the jury's finding in favor of Carter against Beamer on liability. Because he presented uncontested evidence of special damages resulting from the four years spent in prison, Carter claims that Beamer's liability necessarily resulted in those damages and, therefore, the district court incorrectly denied his motion pursuant to Fed. R. Civ. P. 59 for a new trial or amendment of the judgment to include the uncontested damages. However, "[t]he granting or denying of a new trial, either for excessiveness or inadequateness of the verdict, is discretionary with the trial court and not reviewable absent an abuse of discretion." *Bryant v. Muskin Co.*, 873 F.2d 714, 716 (4th Cir. 1989).

We find that the district court's refusal either to grant a new trial, or to amend the verdict to include the damages introduced by Carter, was not an abuse of discretion. In considering Carter's motion, the court explained that a finding of liability against Beamer coupled with an award of nominal damages could be consistently interpreted in two separate ways. First, the jury could have believed Poppa's testimony that he disclosed the materially exculpatory evidence to Burch prior to the first trial. In such a scenario, Beamer's withholding of evidence would not have been the proximate cause of Carter's damages, since Beamer was only required to turn such evidence over to Burch or the investigators on the case, and Burch was already apprised of the evidence. Alternatively, the jury could have found that, although the "Poppa evidence" was materially exculpatory, the presence of such evidence in the first trial would not have resulted in an acquittal. This result would have been consistent with the testimony of the prosecutor at the second trial, who averred that the presence of the "Poppa evidence" was not the cause of Carter's acquittal.

Because there was evidence that Beamer's actions, while technically violating Carter's constitutional rights, did not proximately cause his injuries, we cannot find the district court's denial of Carter's Rule 59 motion to be an abuse of discretion. Clearly, if a defendant can show that the damages complained of would have occurred even if he did not violate plaintiff's constitutional rights, "an award of damages for injuries ... would constitute a windfall, rather than compensation...." *Carey v. Piphus*, 435 U.S. 247, 260 (1978). *See also Smith v. City of Chicago*, 913 F.2d 469, 473 (7th Cir. 1990) (to recover more than nominal damages for a § 1983 action based on a false arrest, the plaintiff must show that although the defendants fabricated evidence, plaintiff

would not have been arrested in the absence of the fabricated evidence), *cert. denied,* 501 U.S. 1217 (1991). Accordingly, we affirm the district court's denial of Carter's Rule 59 motion.

IV.

We now turn to the appropriateness of the district court's Allen charge to the jury. The jury returned to tell the judge that they were deadlocked on the meaning of whether the "Poppa evidence" was "materially exculpatory," and the district court gave the jury an Allen charge, to which Carter objected and from which he now appeals. A district court's decision to give an Allen charge is reviewed for an abuse of discretion. *United States v. Seeright*, 978 F.2d 842, 850 (4th Cir. 1992).

Carter argues that the use of the Allen charge in this instance was impermissibly coercive, and thus an abuse of discretion. We disagree. This court has approved the use of an Allen charge, as long as the instruction is fair, neutral, and balanced. *United States v. Boone*, 759 F.2d 345, 348 (4th Cir.), cert. denied, 474 U.S. 861 (1985). In *Boone*, 759 F.2d at 348 n.2, we set out the required elements of an acceptable Allen charge, to which the district court's charge in this case sufficiently conformed.[3] The judge's comments encouraged

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[3] The district court gave the following Allen instruction:

> In a large proportion of cases, absolute certainty cannot be expected. Although the verdict must be the verdict of each individual juror and not a mere acquiescence in the conclusion of his or her fellows, yet

the jurors should examine the questions submitted with candor and with a proper regard and deference to the opinions of each other.

It is your duty to decide the case, if you can conscientiously do so, and while no juror is expected to yield a conscientious conviction he or she may have as to the weight or effect of the evidence, you should listen with a disposition to be convinced to each other's arguments.

If much the larger number are for the plaintiff a dissenting juror or jurors should consider whether his or her disagreement is a reasonable one when it differs from the opinion of so many persons equally honest, equally intelligent with him or herself.

If, upon the other hand, the majority is for the defendant the minority ought to ask themselves whether they may not reasonably question the correctness of a judgment which is not concurred in by the majority, provided, of course, that each juror who finds himself in the majority shall listen and give consideration to the views of the minority.

You are not partisans, you are judges of the facts. Your sole purpose is to ascertain the truth from the evidence before you.

You are the sole and exclusive judges of the credibility of all the witnesses and of the weight and effect of all of the evidence. In the performance of this high duty, you are at liberty to disregard all comments of both Court and counsel, including the remarks I am now making.

Remember at all times that no juror is expected to yield a conscientious conviction he or she may have

the jurors to reach a unanimous verdict in a fair and neutral manner. He specifically cautioned that no juror should surrender his or her conscientious belief, but that they should listen to arguments of others with an open mind and a disposition to be convinced. We therefore find no abuse of discretion in the court's use of that charge in this case.

V.

Carter next claims that the district court erred in excluding the evidence of Judge Sinclair's letter opinion, which ordered his release on a writ of habeas corpus, and expert testimony to interpret that opinion. In the opinion, Judge Sinclair finds that Carter "ha[d] proven by a preponderance of the evidence that material evidence of an

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as to the weight or effect of the evidence. However, those of you who are in disagreement should re-examine your opinions in light of the contrary opinions of your fellow jurors.

The jury's verdict must represent the final judgment of each juror and not a matter of acquiescence in the majority view of which he or she remains conscientiously unconvinced. But remember also that alter full deliberation and consideration of all of the evidence, it is your duty to agree upon a verdict if you can do so without violating your individual judgment and your conscience. Remember too, that unless your final conscientious appraisal of the evidence in the case clearly requires it, the parties ought not to be exposed to the risk of having to endure a second time the mental and emotional strain of a civil trial, that is, of a retrial. (J.A. at 454-56).

exculpatory nature was not revealed to the defense upon request at the trial which resulted in his conviction and present incarceration." (R. at 144.) We review the district judge's decision to exclude this evidence under an abuse of discretion standard. *Martin v. Deiriggi*, 985 F.2d 129, 137 (4th Cir. 1992).

Carter argues that although it is hearsay evidence under Fed. R. Evid. 801(c), the letter opinion and testimony concerning that opinion was admissible under the hearsay exception for public records and reports. *See* Fed. R. Evid. 803(8)(C). Rule 803(8)(C) allows the admission of hearsay evidence of

> [r]ecords, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth... in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

This court, however, has ruled that this hearsay exception applies to the findings of agencies and offices of the executive branch, but does not apply to the findings of judges. *Nipper v. Snipes*, 7 F.3d 415, 417 (4th Cir. 1993). "A judge in a [criminal] trial is not an investigator, rather a judge." *Id.* Thus, Judge Sinclair's opinion would not be properly admitted under Rule 803(8)(C).

Moreover, because the probative value of Judge Sinclair's opinion would be substantially outweighed by the

danger of unfair prejudice to Beamer, the district court properly excluded the letter opinion under Fed. R. Evid. 403. "[J]udicial findings of fact 'present a rare case where, by virtue of their having been made by a judge, they would likely be given undue weight by the jury, thus creating a serious danger of unfair prejudice.'" *Nipper*, 7 F.3d at 418 (quoting *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 505 F.Supp. 1125, 1186 (E.D. Pa. 1980). In this case, admission of Judge Sinclair's opinion would have been unduly prejudicial to Beamer because the judge's opinion decided the precise issue before the jury in Carter's civil action against Beamer, thereby making it likely that the jury would have placed undue weight on such evidence. We therefore conclude that the district court properly excluded the admission of Judge Sinclair's opinion and any testimony referring to that opinion.

VI.

Finally, Carter argues that the district court erred in denying him an award of attorney's fees under 42 U.S.C. § 1988, which allows the court to award a prevailing party reasonable attorney's fees as part of the cost. We review this denial for an abuse of discretion. *Wadsworth v. Clindon*, 846 F.2d 265, 266 (4th Cir. 1988). Here, the district court held that "[t]he degree of success obtained by the plaintiff, or rather the lack of success, persuades the court to exercise the discretion, which 42 U.S.C. § 1988 bestows, in favor of awarding no fees." (J.A. at 475.)

The district court was correct in asserting that Carter's award of nominal damages rendered him a prevailing party under § 1988. *Farrar v. Hobby*, 113 S. Ct. 566, 573 (1992). In *Farrar*, the Court held that, in some circumstances, a plaintiff who formally prevails under § 1983 should not

receive attorney's fees. The Court stated, "[a] plaintiff who seeks compensatory damages but receives no more than nominal damages is often such a prevailing party." *Id.* at 575. Here, as in *Farrar*, Carter's case involved no broad civil rights issues, and although he sought compensatory damages, he received only nominal damages. Thus, we find that the district court acted within its discretion in refusing to award Carter attorney's fees.

VII.

For the aforementioned reasons, we find Carter's appeal without merit. Accordingly, the judgment of the district court is affirmed.

AFFIRMED

BENCH OPINION OF HON. CLAUDE M. HILTON,
DISTRICT JUDGE
January 8, 1993

THE COURT: All right. Well, I find that if you take this complaint at its best, it does show that the information that allegedly came into Mr. Burch's possession came to him while this case was on appeal and he was handling the appeal.

And I find that prosecutorial immunity extends to the prosecutor through the preparation for and the trial of the case and any motions thereafter and the case on appeal. That is part of the prosecutorial function and a part of the prosecutor's duties.

I also find that there is, that the allegations do not support that this came to him in any kind of an investigative capacity.

Now, the purpose of having immunity and to deal with these issues of immunity and dealing with them earlier in the case is not to put people to the expense of going through trial

for those cases which on their face clearly are immunity situations.

And for those reasons, the motion to dismiss against the defendant Burch will be granted.

J.A. 79-80

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

WILLIAM DOUGLAS CARTER,	)
	) CIVIL
Plaintiff,	) ACTION
	) NO. 92-
v.	) 1629-A
	)
VERNON BEAMER, *et al.*	)
	)
Defendants.	)

MEMORANDUM OPINION

This action which resulted in a jury verdict in plaintiff's favor for $1.00 on his claim for violation of his civil rights, is before the court on the plaintiff's motion for a new trial or to amend the judgment and the motion of the defendant to deny the plaintiff any attorney's fees under 42 U.S.C. §1988.

Motion for New Trial or to Amend Judgment

In the instructions to which the plaintiff did not object, the court concluded its charge to the jury on the civil rights claim with substantially the following language:

> The issues then for you to decide in this case are these as far as the civil rights claim is concerned:
>
> First: Did Poppa, prior to the first trial, disclose to Beamer exculpatory evidence

> which Beamer did not disclose to the Commonwealth's Attorney or investigators? If the answer to that is no, then you should return your verdict for the defendant.
>
> But if your answer to that is yes, then you have a second questions, i.e., was the exculpatory evidence material? If you answer to that question is no, then you should return you verdict for the defendant; but if you answer to this question is also yes and you find that as a proximate result of the acts of the defendant the plaintiff suffered damages, then you shall proceed to the question of those damages and make your award.

The jury's verdict in favor of the plaintiff thus presupposes "yes" answers to both questions.[1]

The concluding remarks were consistent with the other instructions which provided in part:

> You are told that although the defendant Beamer, if he had in his possession material exculpatory evidence prior to the first trial, had not duty to disclose it to Carter's criminal defense lawyer, he did have a duty to disclose

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At one point a question for the jury indicated they could not agree on whether the exculpatory evidence was material. Following a supplemental charge to th jury, to which the plaintiff did object, the jury obviously resolved this disagreement in favor of the plaintiff since a plaintiff's verdict was returned.

it to the Commonwealth's Attorney who was prosecuting the case or investigators working on the case. It would have been, of course, as he has conceded, the duty of the Commonwealth's Attorney to disclose the evidence to defense counsel. And if you find, by a preponderance of the evidence, that Beamer was in possession of material exculpatory evidence, and failed to disclose it as required and that as a proximate result of this the plaintiff suffered damages, then he is entitled to recover for those damages.

In order to prove his claim then the plaintiff must prove by a preponderance of the evidence the following three essential elements:

First: That the defendant performed acts which operated to deprive the plaintiff of his federal Constitutional rights, by suppressing or causing to be suppressed, material exculpatory evidence favorable to the plaintiff.

Second: That the defendant then and there acted under the color of the authority of the State of Virginia.

Third: That the defendant's acts were the proximate cause of damage sustained by the plaintiff.

The jury's award of only $1.00[2] can be explained in either of two ways. First, the jury could have believed that, consistent with Poppa's testimony, Poppa disclosed the materially exculpatory evidence to the Commonwealth's Attorney Burch, so that Beamer's failure to disclose it to Burch was not a proximate cause of the guilty verdict at the first trial because Burch knew of the evidence anyway. Second, the definition of materially exculpatory evidence given to the jury was that there is a reasonable probability that, if such evidence had been disclosed to the plaintiff's criminal defense lawyer, the result at the first criminal trial would have been different. The jury could have believed that although there was a reasonable probability that the result would have been different, the absence of the evidence was not in fact what did result in the guilty verdict at the first trial. This, of course, would have been consistent with the testimony of Mr. Horan, who prosecuted the second trial which resulted in a not guilty verdict. He stated that the presence of the evidence at the second trial had nothing to do with the not guilty verdict.

Under either explanation, there was sufficient evidence to support a finding that although there was material exculpatory evidence known by Beamer and not disclosed by him to the Commonwealth's Attorney, those acts of Beamer were not the proximate cause of damage to the plaintiff.

Given the above explanation of the jury verdict, the

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[2] The possibility of nominal compensatory damages was mentioned by the court in its instruction on punitive damages.

nominal damage award is not against the weight of the evidence. That certain expenses were as a result of the conviction does not necessarily mean they were the result of the defendant's acts.

The motion for a new trial or to amend the judgment will be denied.

Attorney's Fees

On the authority of Farrar v. Hobby, ___ U.S. ___, 113 S.Ct. 566 (1992), attorney's fees will not be allowed the plaintiff. The court recognizes that the plaintiff is the prevailing party, and that because successful civil rights plaintiffs often serve non-pecuniary objectives, a strict proportionality limitation is not always appropriate. City of Riverside v. Riveria, 477 U.S. 556 (1986). Here, however, there were no such objectives served. Monetary damages only were sought. No broad civil rights issues were involved or resolved by the verdict. This was a single plaintiff, single defendant, dispute over a narrow issue. The jury has decided that even if the defendant violated the plaintiff's rights, no harm was sustained by the plaintiff as a result. The degree of success obtained by the plaintiff, or rather the lack of success, persuades the court to exercise the discretion, which 42 U.S.C. §1988 bestows, in favor of awarding no fees.

Albert V. Bryan, Jr. \s\
UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
July 23rd, 1993

U.S.

JAN 6 1995

OFFICE OF THE CLERK

No. 94-1058

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1994

WILLIAM DOUGLAS CARTER,

Petitioner,

V.

WILLIAM T. BURCH,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a prosecutor is entitled to absolute immunity for challenged conduct that occurred during his role as the state's advocate?

2. Whether the bar of prosecutorial immunity can be circumvented by conclusory allegations that the prosecutor engaged in a conspiracy?

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SUMMARY OF THE ARGUMENT

Respondent Burch, who prosecuted Carter in his first criminal trial, was correctly dismissed as a defendant before trial because of absolute prosecutorial immunity. The public policy rationale for the doctrine stated in Imbler v. Pachtman, 424 U.S. 409, 96 S.Ct. 984 (1976) and Buckley v. Fitzsimmons, 113 S.Ct. 2606 (1993), applies because all of prosecutor Burch's challenged actions occurred while he was acting as the state's advocate. Further, if a disgruntled former criminal defendant were able to circumvent the bar of absolute prosecutorial immunity simply by the device of a conclusory allegation of conspiracy, the holdings of Imbler and Buckley would be effectively eviscerated.

Contrary to petitioner's assertions, there is no conflict between the circuits

that requires resolution.

STATEMENT OF THE CASE

The facts of Petitioner Carter's civil rights claim are inextricably bound together with the proceedings in the underlying criminal trials.

I. Carter's First Criminal Trial

Carter was tried and convicted on March 11, 1988 of maliciously wounding his former wife, Carole Vandergrift. She testified that Carter awakened her in the middle of the night, that a struggle ensued, and Carter shot her in the head behind her right ear. The bullet miraculously exited from Ms. Vandergrift's neck without inflicting grave injury.

A. Carter's Attempted Murder Of His Former Wife

The prosecution also presented

evidence that following a very bitter and acrimonious divorce, Carter planned his wife's shooting in advance and attempted to make it look like a suicide.

In the divorce, a finding was entered in favor of Ms. Vandergrift. The property settlement was so favorable to her that Carter was forced to sell his beloved mansion in Middleburg, Virginia. Before the sale was finalized, however, Carter repeatedly threatened his wife and, according to the prosecutor, his anger and revenge reached such a height that he entered the mansion at 2:30 a.m. on the 31st day of July, 1987, in violation of a Loudoun Circuit Court restraining order, and tried to murder his wife.

B. <u>Carter's Alibi Defense Failed Because Of His Wife's Scratches On His Face</u>

Carter's defense alternated between

an alibi and self inflicted wound theory. He claimed that he had left the evening prior to the shooting to go to Saratoga, New York. His attorneys also attempted to argue that Ms. Vandergrift was unstable and may have tried to shoot herself. Fatal to Carter's defense was the evidence, produced by the prosecution, that Ms. Vandergrift scratched Carter's face, shoulder, and arm vigorously during their struggle and the finding by the Saratoga, New York Sheriff's Deputies of fresh, still oozing wounds on Carter's face the next morning. Carter's explanation that he had been scratched by a tree limb sometime before the shooting was destroyed by a woman acquaintance who stated unequivocally that when she left Carter (some four hours prior to the shooting) he had no scratches on his face.

II. All Of The Challenged Actions Of Prosecutor Burch Occurred In His Role As Advocate For The State

In his initial complaint,[1] Carter alleged that prosecutor Burch instructed a witness, Suzanne Culver, to perjure herself at Carter's first trial. (JA 17.) Carter also alleged that Burch presented Culver's perjured testimony at trial, which helped to secure Carter's conviction. (JA 12.) Further, Carter alleged that after Carter's convictions, Burch learned of the "Poppa evidence," yet withheld this materially exculpatory evidence from Carter. (JA 14.) For the purpose of reviewing the dismissal of prosecutor Burch on the ground of absolute

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[1]Burch was dismissed as a defendant before Carter filed his first amended complaint.

prosecutorial immunity, the record reflects that the relevant conversation between Poppa and Burch occurred either (1) after indictment and shortly before trial (JA 171-72.); or (2) shortly after Carter's conviction while Burch was representing the Commonwealth in post-conviction motions. (JA 54-55.)

III. The Evidence At The Trial Below

There were three important aspects of the evidence at trial which help explain the jury's verdict in favor of Carter for $1.00 in nominal damages against defendant Beamer: (1) Poppa's testimony; (2) the testimony of prosecutor Burch; and (3) the defense expert testimony of Messrs. Leffler and Horan.

A. Poppa's Testimony

Poppa testified that he told both

deputy Beamer and prosecutor Burch before the first criminal trial of the alleged "Poppa evidence." (JA 171-72.)

B. The Testimony Of Prosecutor Burch

Prosecutor Burch testified having had a conversation with Poppa about Ms. Vandergrift. However, prosecutor Burch testified that his conversation occurred after the first trial, not before, and that Poppa never told him of the "Poppa evidence." Prosecutor Burch testified that Poppa's statement to him was an inconsequential comment about Ms. Vandergrift being "suicidal" -- nothing more. (JA 267.) Poppa testified that he told prosecutor Burch the same thing he told deputy Beamer. (JA 171-72.)

C. The Expert Testimony Of Messrs. Leffler And Horan

Deputy Beamer presented two experts:

Mr. Rodney Leffler (a defense attorney) and Mr. Robert Horan (the prosecutor, who prosecuted Carter during the second criminal trial). Mr. Leffler's testimony was two-pronged. First, he testified that the so-called "Poppa evidence," if introduced at the first criminal trial, would not have changed the result, i.e., Carter would have been convicted anyway: "... the Poppa evidence made no difference whatsoever." (JA 371.) In support of his opinion, Leffler emphasized several aspects of the first criminal trial including Carter's demeanor on the witness stand, his unconvincing alibi testimony, and his "incredible" story about the way he was scratched. (JA 374.) Mr. Leffler also presented a detailed explanation of the differences between the first and the second trials to counter Carter's contention that if the "Poppa evidence"

had been given to his attorney before the first trial, he would have been acquitted. These explanations included the fact that the defense had a complete blueprint of the prosecution's case; that key pieces of evidence admitted into evidence at the first trial were excluded during the second trial; and the decision, given Carter's poor performance on the witness stand during the first trial, to keep him off the stand the second time. (JA 372-74.)

Mr. Horan supported Leffler's opinions and further opined that the "net effect" of the "Poppa evidence" was a zero, noting that Poppa "... wasn't a very good witness for the defense." (JA 408.)

1. The Fabrications Of Fry And Carter Bolstered Leffler's Opinions

A critical moment at the trial below occurred when one of Carter's witnesses,

Howard Fry, a disgruntled former jailer who had been fired for embezzling funds, was caught in a web of lies while attempting to implicate deputy Beamer. It is surprising for Carter to have featured Mr. Fry's testimony in his petition because it is clear from the record that Fry was a disaster because of his obvious fabrications.

a. Fry Lied

Howard Fry testified, for the first time some six years after the fact (he did not appear at the habeas corpus hearing), that prior to Carter's criminal trial, while Fry was working in the jail, he overheard a conversation between deputy Beamer, Lt. William Wright, and Magistrate Ed Smith about the "Poppa evidence."[2]

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[2]Fry testified that he heard Deputy Beamer repeat the "Poppa evidence" then

Fry claimed that he could remember the exact day and time that the conversation took place: September 2, 1987, sometime between 4:00 p.m. and 6:00 p.m., because that is when Carter was committed to the jail. (JA 260.) Fry's time cards, which came into evidence, showed that on the day that Carter was committed that Fry came to work at 5:45 p.m. (JA 260.) However, the time card which recorded Carter's commitment to jail, which also went into evidence, showed that Carter was committed at 9:37 a.m., some seven (7) hours before Fry came on duty (JA 277.) Additionally, Lt. Wright's time card, which was submitted to

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the group chuckled when Lt. Wright said "I hope that doesn't get out. It would blow your case." (JA 260.)

the jury, showed that Wright was not working that day. (JA 362.)

b. Carter Lied

Having seen Fry trapped in a lie, Carter tried to rescue Fry's testimony, but in doing so, lied himself. Carter, on direct examination, volunteered that although he was committed to the jail in the morning, he was taken out again in "the late afternoon" to give blood and other samples at the Loudoun County Memorial Hospital and then returned to the jail. (JA 278.) The obvious intent of this testimony was to validate Fry's testimony that the statements by deputy Beamer occurred in the late afternoon when Carter came into the jail.

c. Nurse Gruber Exposed Both Fabrications

However, the nurse from the hospital, Ms. Patricia Gruber, who took the samples

from Carter, put the lie to both Fry's and Carter's testimony. Ms. Gruber testified that all of the samples were taken at 10:30 a.m. and that it would take no longer than 45 minutes to an hour to complete the testing, thus putting Carter back into the jail well before Fry came on duty and well before deputy Beamer's alleged statements were to have occurred. (JA 356-57.)

The jury did not accept Fry's testimony or Carter's testimony, which sought to portray deputy Beamer as a malicious person, as reflected by its refusal to return punitive damages and the defendant's verdict on the claim of intentional infliction of emotional distress. Further, Carter's fabrications lent considerable support to defense experts Leffler and Horan who opined that the "Poppa evidence" was really

unimportant when compared with such factors as Carter's lack of credibility during the first criminal trial.

If ever the jury had questioned expert Leffler's opinion that Carter's testimony during the first criminal trial was "incredible," Carter's fabrications before their very eyes put those questions to rest. Unwittingly, Carter bolstered deputy Beamer's argument that the "Poppa evidence" would not in fact have caused an acquittal even if used in the first criminal trial.

ARGUMENT

I. PUBLIC POLICY REQUIRES THAT A PROSECUTOR ENJOY ABSOLUTE IMMUNITY FOR CONDUCT THAT OCCURRED DURING HIS ROLE AS THE STATE'S ADVOCATE

The principle articulated above was recognized in Imbler v. Pachtman, 424 U.S. 411 (1976). Even Petitioner recognizes

the wisdom of the rule. See Petition, p. 15. Without absolute immunity from lawsuits challenging decisions made and actions taken while acting as the state's advocate, a prosecutor would understandably be reluctant to independently and vigorously carry out his or her prosecutorial duties. Yet despite Petitioner's recognition of the correctness of Imbler, he invites the Court to revisit the balancing of competing interests resolved there and significantly dilute prosecutorial immunity. The Court should decline the invitation.

A. Petitioner Incorrectly Argues That The Ruling Of The Fourth Circuit Is Inconsistent With Those Of Other Circuit Courts Of Appeal

The case of Houston v. Partee, 978 F.2d 362 (7th Cir. 1992), does not

conflict with the Fourth Circuit opinion affirming Burch's dismissal on the grounds of absolute immunity. To the contrary, in denying the prosecutors absolute immunity, the Seventh Circuit allowed as how there is "substantial case law granting absolute immunity for acts done in various post-conviction proceedings," but noted what it called "a critical distinction" between such cases and Partee. Id. at 366. (Citations omitted.) The distinction was that the defendant prosecutors "... were not involved in the post-conviction proceedings; that is they were not personally prosecuting the appeal." Ibid. (Footnote omitted). Accordingly, absolute immunity was denied the prosecutors in Partee because they were not in advocacy roles at the time they took the actions complained of. This is a clear distinction from the case at bar.

The Fourth Circuit noted that if the "Poppa evidence" were given to Burch after Carter's arrest but before his conviction, this was during Burch's preparation for a presentation of the case. App. 12. And if the "Poppa evidence" were given to Burch later,

> . . . the evidence is uncontradicted that, at the time Burch testified that he learned of the "Poppa evidence" and failed to disclose it, he was handling the post-conviction motions and the initial direct appeal to the Court of Appeals of Virginia, after which the Attorney General's office took over. In these post-trial motions and preparations for appeal, Burch was still functioning as an advocate for the State, and not in an investigatory capacity.

Id.

Nor does the Fourth Circuit's opinion conflict with Hilliard v. Williams, 516 F.2d 1344 (6th Cir. 1975), which is an old case that is no longer viable. See 424

U.S. 961, 96 S.Ct. 1453 (1976), 540 F.2d 220 (6th Cir. 1976). The rulings in Hilliard were overturned by this Court vis-a-vis prosecutorial immunity in Imbler v. Pachtman and, as regards a police officer testifying falsely in court, in Briscoe v. LaHue, 460 U.S. 325, 103 S.Ct. 1108 (1983).

And neither Malachowski v. City of Keene, 787 F.2d 704 (1st Cir.) nor San Filippo v. U.S. Trust Co. of New York, Inc., 737 F.2d 246 (2d Cir. 1984), addressed the issue of whether the absolute immunity of a prosecutor for acts taken in pursuit of his or her prosecutorial function may be breached by the device of pleading a conspiracy. These cases only held that a witness' absolute immunity does not extend to a claim that the witness conspired with the prosecutor to provide perjured testimony.

If a plaintiff were able to circumvent the bar of prosecutorial immunity simply by conclusory allegations of conspiracy, the ruling of Imbler and the functioning of the criminal justice system would be considerably weakened. See, also, Briscoe v. LaHue, supra, where this Court extended the absolute immunity of prosecutors to witnesses in criminal trials. In reaching this conclusion the Court considered the situation where a plaintiff would allege a conspiracy between a witness and prosecutor to present perjured testimony and, even under those circumstances "... whether private witnesses may ever be held liable for damages under §1983." 460 U.S. at 332; 103 S.Ct. at 1113. The conclusion in Briscoe that witnesses are entitled to absolute immunity indicates that a plaintiff may not destroy a witness' absolute immunity by employing the nicety

of pleading a conspiracy. Nor should a plaintiff be able to destroy a prosecutor's immunity in this fashion.[3]

There is no question that where a prosecutor engages in misconduct while

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[3]It has already been noted that Carter's conspiracy allegations are thin. In both the San Filippo and Malachowski cases, the courts were critical of the plaintiffs conclusory allegations of conspiracy. The Second Circuit dismissed San Filippo's claims for this reason, 737 F.2d at 256, and cautioned that "[w]e think it is imperative for courts to examine with great care any suit charging that prosecution witnesses conspired with the prosecutor, and to dismiss on pre-trial motion those that are clearly baseless. Ibid.

prosecuting an individual, the consequences to that particular criminal defendant can be grave and result in a miscarriage of justice. This was recognized in Imbler, 424 U.S. at 427-428. But weighed against the competing interests of the public in having "the rigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system," id., the Court held that the individual's right to redress had to yield. Id. 429[4] Petitioner does not advance any new arguments to alter this analysis and conclusion.

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[4]Imbler noted that a dishonest prosecutor was subject to disbarment and criminal prosecution, id., no small deterrent to prosecutorial mischief.

Petitioner notes a distinction without a difference, i.e., that the case at bar involves alleged suppression of evidence, while neither Imbler, Burns v. Reid, 500 U.S. 478 (1991), nor Buckley v. Fitzsimmons, 113 S.Ct. 2606 (1993), did. However, the suppression of evidence is the flip side of the decision to present evidence. Whenever a prosecutor makes a decision not to present evidence he or she is subject to the charge of unlawful suppression. To permit a plaintiff to pursue civil litigation against a prosecutor under these circumstances would create such a hole in a prosecutor's immunity, that in effect there would be little left of the immunity at all.[5]

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[5]The decision as to how to use evidence involves the prosecutor's judgment and discretion. Contrary to

Nor do the facts in Burns v. Reed help Petitioner. In Burns the Court upheld the prosecutor's absolute immunity for conduct at a probable cause hearing where the prosecutor kept from the judge, i.e., suppressed, that the confession was obtained while the accused was under hypnosis. No analytical distinction exists between the suppression of the evidence in Burns and that which is alleged here.[6]

Petitioner's position, it can hardly be called ministerial. Petition, p. 21.

[6]The facts in Buckley v. Fitzsimmons are inapposite to the case at bar. Absolute immunity was denied the prosecutor for misconduct during the preliminary investigation of the case and for defamatory remarks during a press

Nor is there a logical distinction between a prosecutor preparing a witness for trial and discussing the witness' testimony beforehand -- or, as Plaintiff would have it, "coaching and instructing the witness what to say...." Petition, 27. In every case, the prosecutor would be vulnerable to the charge that a witness was "coached." The job of every prosecutor, indeed every trial lawyer, entails preparing witnesses for direct and cross examination. The opportunity for incarcerated criminal defendants to become civil plaintiffs in lawsuits against prosecutors alleging that a witness was improperly coached would thoroughly disrupt the criminal justice system.

Petitioner also argues that the

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conference. 113 S.Ct. at 2610.

prosecutor's function is the same as that of a police investigator vis-a-vis the treatment of exculpatory evidence. Petitioner, 21. This misses the point that the prosecutor must weigh the evidence, evaluate the credibility of witnesses, and bears the ultimate responsibility for deciding whether or not to present the evidence to the court. Equating this prosecutorial responsibility with investigative duties is to misunderstand the distinction between the prosecutorial and investigative functions set forth in Buckley v. Fitzsimmons, supra. and myriad other cases.[7]

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[7]Even if Petitioner were correct, the result should perhaps be the extension of absolute immunity to the police officer. See Albright v. Oliver, ___ U.S. ___, 114 S.Ct. 807, 816, n. 5 (J. Ginsburg

II. THE BAR OF PROSECUTORIAL IMMUNITY SHOULD NOT BE ABLE TO BE CIRCUMVENTED BY THE NICETY OF CONCLUSORILY PLEADING A CONSPIRACY

To permit an end run around Imbler by the device of pleading a conspiracy to fabricate or suppress evidence between the prosecutor and a witness would be to effectively eviscerate absolute prosecutorial immunity. The case of Burke v. Miller, 580 F.2d 108 (4th Cir. 1978), cert. denied, 440 U.S. 930, 99 S.Ct. 1268 (1978), decided before Briscoe v. LaHue, supra., is instructive. In Burke, the plaintiff alleged, inter alia, that the prosecutor and State Medical Examiner conspired to present perjured testimony to deprive him of his civil rights by denying him a fair trial on earlier criminal

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concurrence).

charges. Relying on Imbler, the Fourth Circuit affirmed dismissal of the State Medical Examiner as a defendant on the ground of absolute immunity, stating that Imbler

> ... reaffirms "that §1983 [and, we believe §1985 as well] is to be read in harmony with general principles of tort immunities and defenses rather than in derogation of them."

Id. at 109. (Footnote omitted; brackets in original.) That the logic of Burke that the absolute immunity enjoyed by prosecutors and witnesses extends to allegations of conspiracy is reflected in Briscoe. Just as a plaintiff is not permitted to destroy a witness' immunity by alleging that the witness and prosecutor conspired to present perjured testimony, Briscoe, 103 S.Ct. at 1113, nor should a prosecutor's immunity be so easily destroyed. As is discussed supra.,

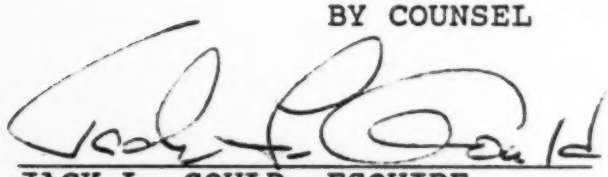
the Malachowski and San Filippo cases do not hold to the contrary and no conflict in the Circuits exists on this point.

CONCLUSION

For the reasons stated, Respondent Burch submits that the petition should be denied.

Respectfully submitted,

WILLIAM T. BURCH,
BY COUNSEL



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JAN 19 1995

No. 94-1058

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1994

WILLIAM DOUGLAS CARTER,

Petitioner,

V.

WILLIAM T. BURCH,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF

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MISSTATEMENTS IN OPPOSITION BRIEF

Respondent Burch injects in his Brief in Opposition selective facts, outside the record in this case,[1] regarding the underlying criminal case in an effort to divert attention from the issues on appeal. Many of the facts are irrelevant to this appeal, and many are simply inaccurate.[2]

1

The record of the first criminal trial was not admitted in evidence in this civil rights case; nor was the criminal case retried. J.A. 223.

2

While irrelevant to the issues on appeal, the inaccuracies are too blatant to ignore. For example, there was a conflict between the experts as to whether the bullet entered Carole Carter's neck and exited behind her right ear as she was lying on her back with her head on a pillow, consistent with the physical evidence and the defense theory of self-inflicted wound, or whether the bullet entered behind her right ear and exited her neck, as she testified.

Also, Carter was not "forced" to sell his mansion in Middleburg because of a property settlement in favor of Carole Carter. In fact, the property issues in the bifurcated divorce proceeding were not decided by the divorce court until February 1988, over six months after the shooting. A contract to sell the mansion and farm was agreed to by both parties about two months prior to the shooting with the closing scheduled for the first of September 1987. Depression over having soon to move out of her beloved mansion likely contributed to Carole shooting herself on July 31, 1987.

For example, respondent Burch insists the Poppa evidence was not material despite the fact the jury found it so (as did Judge Sinclair in the habeas corpus case). Even his co-defendant Deputy Sheriff Vernon Beamer admitted in testimony at trial that the Poppa evidence was both "important" and "exculpatory," and that it would have helped Carter in the first criminal trial. J.A. 343.

Likewise, Deputy Sheriff Beamer's knowledge of the Poppa evidence on September 2, 1987, is irrelevant to the issues presented in this petition concerning the scope of prosecutor Burch's absolute immunity. The jury obviously found that Beamer did have such knowledge in holding him liable. Respondent Burch's quibbling about witnesses' memories of the precise time a particular conversation occurred almost six years previously further undermines his contention that the Poppa evidence was not material. In fact, Beamer's jail house conversation of September 2, 1987 -- that if the Poppa evidence gets out "it would blow your case" -- merely reinforces that the Poppa evidence was materially exculpatory. The jury verdict against Beamer establishes that neither witness Howard Fry nor

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More egregious still are the statements of fact concerning the scratches. There was no evidence of any scratches "oozing" on Carter's face the next morning. Only a small horizontal scratch, similar to a razor cut, was found on Carter's chin the following afternoon, and this was entirely inconsistent with Carole's testimony that she "raked" his face and arm with her fingernails. Furthermore, an expert testified that the scratches on Carter's shoulder and arm were inconsistent with fingernail scratches and consistent with his explanation of riding his tractor inadvertently into a tree limb the day before the shooting.

Carter are "liars", as Burch would wish, and that the Poppa evidence is materially exculpatory.

ARGUMENT

1. RESPONDENT BURCH PRESENTS NO PRE-1871 COMMON LAW PRECEDENT AND ARTICULATES NO POLICY JUSTIFICATION TO SUPPORT ABSOLUTE IMMUNITY FOR WITHHOLDING MATERIALLY EXCULPATORY EVIDENCE.

As a substitute for any reasoned analysis, Burch merely concludes he is entitled to absolute immunity because of his status as a prosecutor, ignoring the "functional" test for determining absolute immunity.

Incredibly, prosecutor Burch argues that the out-of-court conduct of withholding materially exculpatory evidence from a criminal defendant in violation of *Brady v. Maryland*, 373 U.S. 83 (1963) is the "flip side" of the decision to present evidence in court. He equates the advocates decision whether to present evidence in court with the administrative decision to withhold knowledge of the existence of materially exculpatory evidence from a defendant prior to trial and subsequent to trial. This confused reasoning ignores the mandatory nature of the duty to disclose to the defense in discovery materially exculpatory evidence for use by the defense in court. This non-discretionary duty differs markedly from a prosecutor's trial advocacy decisions concerning whether and how particular evidence should be presented and handled in court.

It can not be questioned that whether to turn over

materially exculpatory evidence to the defense is mandatory and not subject to a prosecutor's discretion. *Brady v. Maryland, supra* at 87; ABA Code of Professional Responsibility, Ethical Considerations, E.C. 7-13; Disciplinary Rules, D.R. 7-103(B). This is unlike the trial advocate's discretionary decision regarding how to use evidence at trial.

Respondent also sees no "analytical distinction" between the allegations here and the prosecution not presenting evidence at a hearing to obtain a search warrant in *Burns v. Reed*, 500 U.S. 478 (1991).[3] However, in *Burns* the defense was well aware of the exculpatory evidence that the confession was obtained through hypnosis. As a result, the defense was able to present this evidence to the court which in turn dismissed the charges against Burns. Thus, *Burns v. Reed* involved no suppression of evidence from the defendant, the issue involved here.

The evil in withholding materially exculpatory evidence from the defense is that the defendant is denied the opportunity to present such evidence to the court and the adversary system is denied the opportunity to determine the truth. Justice is

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[3] In a concurring opinion, Justice Scalia took issue with granting absolute immunity to the function of wrongfully procuring a search warrant because absolute immunity for this function did not exist in 1871 when Section 1983 was enacted and because procuring a search warrant is further removed from the judicial phase of a criminal prosecution than procuring an indictment, citing *Malley v. Briggs*, 475 U.S. 335 (1986)(denying absolute immunity to policemen for procuring arrest warrant).

denied when the prosecutor unfairly withholds evidence which a defendant could use to establish his claim of innocence.

Respondent Burch fails to recognize the conflict between the Fourth Circuit opinion in this case and *Houston v. Partee*, 978 F.2d 362 (7th Cir. 1992) *cert. denied*, 507 U.S. ___, 123 L.Ed.2d 269, 113 S.Ct. 1647 (1993), where both the district court and the Seventh Circuit held prosecutors liable for suppression of evidence first learned post-conviction. The fact that the prosecutors sued were not "personally" handling the appeal within the prosecutor's office is hardly material to the court's holding. Indeed, the district court's opinion, which was affirmed, did not even refer to the fact that the defendant prosecutors were not personally prosecuting the appeal of the underlying criminal case. 758 F. Supp. 1228 (N.D. Ill. 1991). This tenuous distinction makes no legal difference because suppressing evidence involves no advocacy role whatsoever. The duty to turn over materially exculpatory evidence derives from the ethical duty of prosecutors as administrators of justice.

Respondent Burch correctly notes that after the Sixth Circuit's decision in *Hilliard v. Williams*, 516 F.2d 1344 (6th Cir. 1975), this Court remanded for further consideration in light of *Imbler v. Pachtman*, 424 U.S. 411 (1976). 424 U.S. 961 (1976). In *Imbler*, Justice White commented favorably upon the Sixth Circuit *Hilliard* opinion.[4] Nevertheless, on remand, the

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[4] Citing *Hilliard*, Justice White noted the injury to a defendant caused by unconstitutional suppression of exculpatory evidence is "substantial." On the other hand, "it is virtually impossible to identify any injury to the judicial process resulting from a rule permitting suits for such

state prosecutor was accorded absolute immunity when the court failed to see the distinction between that case and *Imbler*. 540 F.2d 220 (6th Cir. 1976). *Hilliard* did not come back to this Court for further review.

In contrast, the D.C. Circuit saw a clear distinction between the conduct accorded absolute immunity in *Imbler* and a federal prosecutor withholding exculpatory evidence in *Briggs v. Goodwin*, 569 F.2d 10 (D.C. Cir. 1977), *cert. denied*, 437 U.S. 904 (1978). There, the court properly denied absolute immunity to a prosecutor for withholding exculpatory evidence from the defense and the court. This is the same conduct involved in *Hilliard*.

In *Briggs*, defense counsel moved for disclosure of any agents or informers among witnesses subpoenaed to a grand jury. In open court, the prosecutor was questioned under oath and answered that no witnesses represented by counsel were agents or informants of the government. A year later, in written materials turned over under the Jencks Act, 18 U.S.C. 3500 (1970), the defense learned that one of the witnesses had been functioning as a paid FBI informant. In the subsequent civil suit, the D.C. Circuit, relying upon *Imbler*, held that the prosecutor was entitled to qualified immunity only because he was functioning as an investigator, rather than as an advocate, in withholding the exculpatory information from the defense.

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unconstitutional conduct, and it is very easy to identify an injury to the process resulting from a rule which does not permit such suits. Where the reason for the rule extending absolute immunity to prosecutors disappears, it would truly be 'monstrous to deny recovery.' [citation omitted]." 424 U.S. at 444-45.

Following Justice Powell's reasoning in *Imbler*, the court noted that while some functions in preparation of trial might be absolutely immune, others are not. The court concluded that "absolute immunity under *Imbler* extends only so far as necessary to protect a prosecutor's decision with respect to the initiation and conduct of particular cases." 569 F.2d at 20.

The D.C. Circuit held the disclosure of the government informants in that case was a mandatory duty, not subject to a prosecutor's discretionary "quasi-judicial" decision. Thus, there was no justification to protect such conduct from absolute immunity.

> The obligation to disclose, pursuant to judicial direction, the presence of Government informants among those subpoenaed to testify before the grand jury is entirely foreign to advocacy issues such as whether to initiate a prosecution or how to conduct a prosecution once begun. Such disclosure was, rather, an action required of appellant by the court in order to enable the court to deal with a possible defect in the conditions under which subpoena compulsions had been brought to bear in the grand jury investigation.

569 F.2d at 21.

The present case is even stronger for denying absolute immunity because the conduct of prosecutor Burch occurred wholly outside the scope of any court proceeding. Whereas the prosecutor in *Briggs* withheld the information in testimony under oath in a court proceeding, thereby raising the issue of

witness as well as prosecutorial immunity, the D.C. Circuit recognized that the function performed was not advocacy, but rather investigatory, involved no quasi-judicial discretionary decision making, and warranted no absolute immunity. *A fortiori*, the wholly out-of-court conduct of prosecutor Burch in withholding the Poppa evidence warrants no absolute immunity in the present case.

The court in *Briggs* established a workable standard for determining which conduct preparatory to trial warrants absolute immunity and which conduct warrants only qualified immunity. Where the conduct involves no quasi-judicial decision making and where immunity is not necessary to protect a prosecutor's discretionary decisions with respect to initiation of charges and the conduct of the trial, absolute immunity is not justified for a prosecutor any more than any other executive official who enjoys only qualified immunity.

2. RESPONDENT BURCH IGNORES THE ANALYSIS AND HOLDING IN *BUCKLEY V. FITZSIMMONS* THAT A PROSECUTOR'S FABRICATION OF EVIDENCE IS NOT ABSOLUTELY IMMUNE.

Prosecutor Burch also incredibly sees no logical distinction between a prosecutor preparing a witness for trial and "coaching and instructing" a witness to perjure herself. Yet, such distinction is critical to the professional responsibilities of advocates. *See* ABA Code of Professional Responsibility, Ethical Considerations, E.C. 7-26; Disciplinary Rules, D.R. 7-102(A)(4).

Without any reasoned analysis, the respondent suggests

that the opportunity for prosecutors to be sued for improperly coaching witnesses would "thoroughly disrupt" the criminal justice system. However, improperly tampering with witnesses is already a basis for habeas corpus suits, and the criminal justice system has not been "thoroughly disrupted", but rather strengthened in its truth seeking function as a result. In a civil rights suit, the plaintiff has the added burden of proving the challenged conduct was done intentionally and willfully and resulted in provable damages. Moreover, conclusory and unsupportable allegations can be readily weeded out pretrial.

Respondent Burch ignores both the analysis and holding in *Buckley v. Fitzsimmons*, 113 S.Ct. 2606 (1993) that a prosecutor's out-of-court fabrication of evidence is not subject to absolute immunity any more than an investigator's fabrication of evidence is subject to absolute immunity. Rather, Burch claims the conspiracy allegations here are "thin," sidestepping the issues presented in this petition.

However, Carter's allegations of conspiracy to fabricate evidence in this case are fact specific. A detailed affidavit of the witness herself supports the allegation that Burch fabricated the testimony of witness Suzanne Culver by coaching and instructing her to deny that Carole Carter made a statement showing knowledge that her own .38 caliber was used in the shooting.

Respondent Burch relies upon *Burke v. Miller*, 580 F.2d 108 (4th Cir. 1978), *cert. denied*, 440 U.S. 930 (1978), which held that a witness medical examiner was absolutely immune from civil liability for testimony in court as well as conspiracy to present perjured testimony in court. This is the same immunity accorded witnesses in *Briscoe v. LaHue*, 460 U.S. 325 (1983). *Burke* did not deal with the *prosecutor's* immunity from

conspiracy to fabricate evidence and fabrication of evidence, the issues involved here.

CONCLUSION

Respondent Burch has presented no pre-1871 common law precedent and no policy to justify absolute immunity for his conduct of withholding materially exculpatory evidence pre-trial and post-trial and fabricating and conspiring to fabricate the testimony of Suzanne Culver.

Because the opinion of the Fourth Circuit substantially departs from the "functional" test for determining prosecutorial absolute immunity as set forth in *Imbler, Burns, and Buckley*, because the Fourth Circuit opinion conflicts substantially with sister circuits on these issues, and because prosecutorial abuse of power in withholding materially exculpatory evidence and fabricating and conspiring to fabricate evidence is a serious national problem which can and must be deterred by civil liability, this Court should grant this Petition for a Writ of Certiorari to the Fourth Circuit.

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